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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1902~~ 1903.

No. ~~420~~ 150

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK AND THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY, APPELLANTS.

vs.

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, INDIVIDUALLY AND AS MAYOR OF THE CITY OF NEW YORK; BIRD S. COLER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 28, 1902.

(18,717.)

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1 The President of the United States of America to Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, individually and as comptroller of the city of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jesup, individually and as members of the pretended board of rapid-transit commissioners of the city of New York; John B. McDonald, the Rapid Transit Subway Construction Company, and the City of New York, Greeting:

You are hereby commanded that you and each of you personally appear before the judges of the circuit court of the United States of America, for the southern district of New York, in the second circuit, in equity, on the first Monday of August, A. D. 1901, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by the Underground Railroad of the City of New York and the Rapid Transit Underground Railroad Company, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, on the 9th day of July, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States of America, the one hundred and twenty-sixth.

JOHN A. SHIELDS, *Clerk.*

JAMES M. FISK,
Solicitor for Complainants.

2 The defendants are required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of August, 1901, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

I hereby certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Robert A. Van Wyck, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Robert A. Van Wyck, as mayor of the city of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Bird S. Coler, individually, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Bird S. Coler, as comptroller of the city of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

3 I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Woodbury Langdon, individually, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Woodbury Langdon, as a member of the pretended board of rapid-transit commissioners of the city of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity, upon the within-named George L. Rives, individually, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna upon the within-named George L. Rives, as a member of the pretended board of rapid-transit commissioners of the city of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named John B. McDonald,

4 by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Rapid Transit Subway Construction Company, by exhibiting to Frederick Evan, as secretary of said company, the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 10th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named John H. Starin, individually, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 10th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named John H. Starin, as a member of the pretended board of rapid-transit commissioners of the city of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify that on the 10th day of July, 1901, at the

city of New York, in my district, I personally served the within subpœna in equity upon the within-named Albert E. Orr, whose right name is Alexander E. Orr, individually, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 10th day of July, 1901, at the city of New York, in my district, I personally served the
5 within subpœna in equity, upon the within-named Albert E. Orr, whose right name is Alexander E. Orr, as a member of the pretended board of rapid-transit commissioners of the city of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I am unable to find the within-named Charles L. Smith and Morris K. Jesup.

WILLIAM HENKEL,
U. S. Marshal, S. D. of N. Y.

New York, July 10th, 1901.

(Endorsed:) Circuit court of the United States, for the southern district of New York.—The Underground Railroad of the City of New York, *et al. vs.* Robert A. Van Wyck, individually, and as mayor of the city of New York and others.—Subpœna.—U. S. circuit court, Filed Jul- 10, 1901, John A. Shields, clerk.

6 *Bill in Equity.*

Circuit Court of the United States, Southern District of New York.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

The Underground Railroad of the City of New York, and the Rapid Transit Underground Railroad Company each of which is a domestic corporation duly organized and existing under the laws of the State of New York, with its principal office and place of residence in the city and county of New York, and a citizen and resident of the city, county and State of New York, and a tax-payer in the city, county and State of New York, presents this their bill of complaint against the City of New York, which is a domestic and a public corporation duly organized and existing under laws of the State of New York and a citizen of the State of New York, Robert A. Van Wyck individually and as mayor of the city of New York, who is a resident of the city, county and State of New York, Bird S. Coler individually and as comptroller of the city of New York who is a citizen and resident of the city and State of New York, Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jessup individually, and as members of the pretended board of rapid-transit commissioners of the city of
New York each of whom is a citizen and resident of the city,
7 county and State of New York, John B. McDonald, who is a citizen and resident of the city, county and State of New

York, and the Rapid Transit Subway Construction Company, which is a domestic corporation organized and existing under the laws of the State of New York with its principal office and place of business in the city, county and State of New York and which is a citizen and resident of the city, county and State of New York.

And thereupon your orators complain and say:

I. The names, the residences and citizenship of the parties to this suit are correctly stated in the introduction to this bill; and the same are hereby incorporated by reference into this paragraph of this bill with the same effect as if the same were separated and set forth here specifically and at length. On March 26th, 1881, the Central Tunnel Railway Company, a domestic corporation, was duly organized under and in pursuance of the so-called general railroad and tunnel law of the State of New York, namely, chapter 140 of the Laws of 1850 and the various acts amendatory of and supplemental to the same and chapter 582 of the Laws of 1880. In pursuance of said statute, articles of association were duly executed and filed and recorded in the office of the secretary of state of New York on March 26, 1881. Subsequently thereto on or about November 12, 1881, said articles were duly amended by the board of directors of said Central Tunnel Railway Company.

A copy of said articles of association as amended was on or about December 7, 1881, duly executed and filed and recorded in the office of the secretary of state of New York. A copy thereof as amended is annexed to this bill and marked Exhibit A.

Each and every statement in the said articles of incorporation is true. Compliance and obedience were duly made by said corporation and its incorporators, members, officers and stockholders with all the requirements of the statutes of the State of New York
8 with respect to the incorporation of railroad companies and tunnel companies. Stock in said corporation to the extent of two thousand ($2,000) dollars for every mile of railroad proposed to be made was duly subscribed for and more than fifty per cent. thereof was actually paid in cash to said corporation by the subscribers of said stock before said articles of association were filed as aforesaid.

On or about March 28, 1882, a map and profile of the route intended to be adopted and adopted by said corporation was duly signed and certified by the president and engineer of said corporation, and by a majority of the board of directors of said corporation, and filed in the office of the register of the county of New York.

Written notice of the time and place where said map and profile were filed, and that the route designated thereon passed over the lands of such occupants, was duly given by said corporation on or before June 20, 1882, to all the occupants of the land over which the route of said railroad and tunnel was so designated.

The route and line of said corporation were duly surveyed, costly plans, estimates and specifications for its construction were made and more than $100,000 were expended by said corporation in surveying, preparing plans and specifications and preparing for the construction of the railroad and tunnel described in its said articles of association and maps.

II. Section 1 of chap. 582 of the New York Laws of 1880 is as follows: "Whenever according to the route and plans adopted by any "railroad company heretofore or hereafter formed under any special "act of the legislature of this State, or under chapter one hundred "and forty of the laws of eighteen hundred and fifty, entitled 'An "act to authorize the formation of railroad corporations and to "regulate the same,' and all acts supplementary thereto or amenda-"tory thereof for the building of its railroad, it shall be necessary
"or proper to build said road, or any part of the same under
9 "ground, or to tunnel or bridge any river or waters, it shall
"be lawful for said company to enter upon and acquire title "to and use such lands under water and uplands, except on or "along any canals owned by the State, as shall be necessary for pur-"poses herein mentioned, and they shall have the power to con-"struct, erect and secure the necessary foundations and other struct-"ures which may be required for the operating of such road or "connecting the same with another and for maintaining the same, "and purchase or acquire, in the manner now provided by law, "such lands or rights or easements in land along their said route "upon, over or beneath the surface thereof, as may be necessary for "the building of their said road and making such connections; "provided, however, that where said road runs underneath the "ground at such depth as to enable said company to tunnel the "same, such tunnel shall be so built and at all times kept in such "condition as to make the surface of the ground above the same "and in the neighborhood thereof firm and safe for buildings and "other erections thereon, and, in case surface excavations are made, "as soon as can be done the surface shall be restored to its former "condition, except so far as may be actually required for ventilation "of the tunnel beneath the same or access thereto; and provided, "further, that whenever such road, or any part of the same, is "intended to be built within the limits of any city or incorporated "village of this State and to run by means of a tunnel underneath "any of the streets, roads or public places thereof, the said com-"pany, before building the same underneath any of said streets, "roads or public places, shall obtain the consent of the own-"ers of one-half in value of the property bounded on the line, and "the consent of the board of trustees of the village by resolution "adopted at a regular meeting and entered on the records of "said board, and of the proper authorities having control of said
"streets, roads or public places; or in case such consent of the
10 "owners of property bounded on the line cannot be obtained,
"the general term of the supreme court in the district in "which such city or village is situated may, upon application, "appoint three commissioners who shall determine, after a hear-"ing of all parties interested, whether such railroad ought to be "allowed to be built underneath said street-, roads and public "places, or any of them, and in what manner the same may be so "built with the least damage to the surface, and to the use of the "surface to the public, and the determination by said commissioners, "confirmed by the court, may be taken in lieu of the consent of said

"authorities and property-owners. And provided, further, that when "any railroad company constructs, under this act, its railroad under "any part or within the limits of any city or incorporated village "of this State, subject to the provisions and limitations of this act it "shall be lawful for any railroad company to connect its road there- "with at such points or places as such company may elect, and all "railroad companies constructing their road or roads under the pro- "visions of this act shall be subject to all the provisions of an act "entitled 'An act to authorize the formation of railroad companies, "and to regulate the same,' passed April second, eighteen hundred "and fifty, and all acts supplementary thereto and amendatory "thereof; and further at such point or points, place or places, where "such connections shall be made by connecting roads, the railroad "companies owning such roads shall build, at their joint expense "and for their joint use, such passenger and freight depots, and "other accommodations for handling passengers and freight as may "be required for the convenience of the public."

Section 2 of the same chapter 582 of the Laws of 1880 is as follows: "Any such railroad company, the greater part of whose road- "bed according to its said route and plan is to be below the "surface of the ground, and whose road does not exceed "three miles in length, may at any time after its said route "shall have been adopted, and the map thereof shall have been filed "as required by law, merge and consolidate its capital stock, fran- "chises and property with the capital stock, franchise and property "of any other railroad company organized under the laws of this "or any other State, in the manner now provided by law for the "consolidation of railroad companies, whenever the railroads of said "companies so to be consolidated may together form a continuous "line of railroad, provided such consolidation shall not prevent all "connecting railroads from having equal rights of transit for their "passengers and freight through the tunnel upon the same equita- "ble terms."

III. On account of the prejudice then existing among the inhabitants and property-owners of the city of New York against the construction of street railroads and especially against the construction of underground railroads in the city of New York, the consent of the owners of property bounded on the line of the proposed railroad of the said Central Tunnel Railroad Company, could not then be obtained; although an attempt to procure such consents *were* duly made by said corporation prior to the application hereinafter described. For that reason, after such an attempt had been made and such consent could not be obtained, the said Central Tunnel Railway Company duly applied to the general term of the supreme court of the State of New York, for the first department, for the appointment of three commissioners to determine, after a hearing of all parties interested, whether such railroad ought to be allowed to be built under the streets, roads and public places of the city of New York specified in the said articles of association of said Central Tunnel Railway Company and to determine in what manner the said railroad might be built with the least dam-

age to the surface and to the use of the surface by the public. On February 2nd, 1883, an order was duly made,
12 on said application by said court. A copy of said order is hereto annexed marked Exhibit B. The said order granted the application and appointed the Honorable William G. Choate, the Honorable John T. Agnew and the Honorable James McLean commissioners for said purpose, with full power in said commissioners to grant to said corporation authority to construct said tunnel to the same extent as if the local authority and the abutting property-owners had consented to such construction. Messrs. William G. Choate and James McLean immediately duly accepted said appointment, duly qualified and entered upon the discharge of their duties. Proceedings under the said order are still pending before them undetermined for the following reasons. Mr. John T. Agnew declined to accept the said appointment and refused to qualify and refused to act as said commissioner. A vacancy in said commission was thereby made which deprived said commission of power to act until said vacancy was filled. The said corporation then duly applied to said general term for the appointment of a commissioner to fill the vacancy in said commission caused by the *removal* of said John T. Agnew to serve as such commissioner. The said general term thereupon duly appointed the Honorable William R. Grace as such commissioner to fill such vacancy. The said William R. Grace, however, declined said appointment and refused to qualify and refused to serve as such commissioner. Thereupon the said Central Tunnel Railway Company duly applied to the said general term for the appointment of a third commissioner to fill the said vacancy in said commission; and at the same time the said corporation duly offered to deposit in any place which the said court might designate the sum of five thousand ($5,000) dollars as security for the payment of the expenses of said commission. Said application was duly granted by said court. An order providing for filling said vacancy which proposed order left the name of the new commissioner
13 in blank to be supplied by the court, was duly drafted by the attorney for said corporation and immediately submitted by him to said general term. The said general term of the supreme court for the first department has not yet; and its successor the appellate division of the supreme court for the first department, has not yet entered said order and neither of said courts has filled said vacancy; and neither of said courts has yet designated nor appointed said third commissioner.

The rights of corporations similarly situated to said corporation in such a case under the laws of the State of New York *is* and *has* been said to be as follows:

"As to the first question (is the company precluded by laches "from calling the undetermined application for a third commis- "sioner to the attention of the court) there can be no question but "that there has been great delay in this matter. The important "question is has the delay been caused by the tunnel Co. Upon "the refusal of Mr. Grace to act, the tunnel company made an ap- "plication to the court for the appointment of a commissioner in his

"place. The application was heard, the papers filed and decision "reserved. The company had then done all that it was called upon "to do, the matter then passed to the court for its consideration and "any delay in the handing down of a decision was the delay not of "the petitioner, but of the court. No rule of law requires a peti- "tioner, to remind the court that it has not rendered a decision. It "is the duty of the court to determine matters properly presented to "it and litigants are warranted in presuming that the courts will "duly render their decisions. If the court delays in the perform- "ance of its duty, it would be a harsh rule of law which would "attribute the laches of the court, if it may be so called, to the liti- "gant."

In consequence of said inaction of the said general term and of its said successor proceedings before said commissioners
14 have been necessarily suspended; and the said Central Tunnel Railway Company has not and its successor your orator, The Underground Railroad of the City of New York has not, been able to continue the proceedings before said commissioners; and neither of said corporations has been able to commence the construction of its line of railroad. Said delay has been due to no fault, neglect nor omission of the said Central Tunnel Underground Railway Company and to no fault, neglect nor omission of your orator; but solely to the inaction and delay of the said court and to the acts of the defendants hereinafter set forth.

IV. Your orator is advised by its counsel learned in the law and your orator claims, insists and alleges; that by the aforesaid proceedings the said Central Tunnel Railway Company has acquired a vested and exclusive right and an exclusive franchise and an exclusive easement for the construction of a tunnel and an underground railroad over the route specified in the said articles of incorporation of the said Central Tunnel Railway Company.

In Rochester, H. & L. R. R. Co. *v.* N. Y., L. E. & W. R. Co., 44 Hun. 206, 210; the general term of the supreme court said, speaking through Barker:

"Under the general railroad act where a corporation has been "organized in compliance with the conditions of the statute and has "made a map and profile of the route intended to be adopted by "the company duly certified and filed as required by the twenty- "second section, it has acquired a vested and exclusive right to "build, construct and operate a railroad on the line which it has "adopted."

The decision and opinion were affirmed and approved by the New York court of appeals.

In Rochester, H. & L. R. R. Co. *v.* The N. Y. L. E. & W. R. R. Co. 110 N. Y. 128, 132–134 where that court said, speaking through Judge Gray:

"We think the general term were right in the view they took of the matter.

15 "The plaintiff, by its organization under the general rail- "road act of 1850, became possessed of the franchise to con- "struct and operate a railroad between the terminal points named

"in its articles, over such a line of route as it should elect. When "the initial steps, pointed out in the twenty-second section of the act "had been taken, there only remained for the plaintiff to acquire "through purchase, or through proceedings *in invitum*, the right of "way over the lands through which the line of route had been sur- "veyed. By the terms of that section every company formed under "the act, before constructing any part of its road through any "county, must make and file a map and profile of the route in- "tended to be adopted and must give a written notice to all occu- "pants of the land affected, of the time and place of filing and that "the route designated passes over the land of such occupants.

"Clearly there is involved in these provisions the intention of the "legislature that, after the initial proceedings have been taken, "which the statute points out as the first action of the new corpora- "tion, the lands over which the company's route is located shall be "subjected to the right of the company thereafter to construct "thereon. The legislative scheme contemplates the determination "of the line of route to be in the discretion of the company, to be "exercised in the mode prescribed by law and its exercise, when in "good faith and within the limits of its corporate powers, is only "reviewable by the court in the case of an application by an occu- "pant or owner of lands feeling aggrieved by the proposed location "of the road. This right to locate its line of road, at its election, is "delegated to the corporation by the sovereign power; as is the "right subsequently to acquire, *in invitum*, the right of way from "the land-owner and any land needed for the operation of its road.

"In this sovereign power is the source of the franchise, which
16 "the corporation possesses to construct and operate a railroad,
"and its grant is for public and not for private purposes.
"Public considerations enter into the grant of the franchise and "public policy favors the enterprise for the public convenience and "use. When therefore, a corporation has made and filed a map and "survey of the line of the route it intends to adopt for the construc- "tion of its road, and has given the required notice to all persons "affected by such construction, and no change of route is made, as "the result of any proceeding instituted by any land-owner or occu- "pant, in our judgment, it has acquired the right to construct and "operate a railroad upon such line; exclusive in that respect as to "all other railroad corporations and free from the interference of "any party. By its proceedings it has impressed upon the lands a "lien in favor of its right to construct, which ripens into title through "purchase or condemnation proceedings. We could not hold other- "wise without introducing confusion in the execution of such cor- "porate projects and without violating the obvious intention of the "legislature.

"The plaintiff's franchises were invaded and its enjoyment of "the statutory privileges disturbed by the action of the defendant "company, in so building tracks upon plaintiff's line of route as to "obstruct and interfere with its proposed construction. The remedy "by injunction was clearly available to the plaintiff on principles "of equity jurisprudence."

That such a right is a contract right and a right of property which *are* protected by the Constitution of the United States, is held by the same courts of the State of New York in O'Brien *vs.* Mayor &c., of N. Y., 111, N. Y. 1. Coney Island etc. R. R. Co. *v.* Kennedy; 15 App. Div. 588; Roddy *v.* Brooklyn City & N. R. R. Co., 32 App. Div. 311: and other cases.

V. On or about January 2, 1883, the New York and New Jersey Tunnel Railway Company was duly organized and incor-
17 porated under and in pursuance of chapter 140 of the New York Laws of 1850 and chapter 582 of the New York Laws of 1880 and the various acts amendatory of said statutes and supplementary to the same; and at or about said date, articles of association of the said New York and New Jersey Tunnel Railway Company were duly filed and recorded in the office of the secretary of the State of New York.

The line and route of said last-named corporation formed a continuous and a connected line with the line and route of the Central Tunnel Railway Company and with the line and route of the Terminal Underground Railway Company and the lines and routes of the said three corporations formed a continuous and a connected line.

On or about March 25th, 1886, the Terminal Underground Railway Company was duly organized and incorporated under and in pursuance of chapter 140 of the New York Laws of 1850 and chapter 582 of the Laws of New York of 1880 and the various acts amendatory to said statutes and supplementary to the same; and at or about said date articles of association of the said Terminal Underground Railway Company were duly filed and recorded in the office of the secretary of state of New York, a copy of which articles is hereto annexed and marked Exhibit D.

On or about August 21, 1896, the said Central Tunnel Railway Company and the said New York and New Jersey Tunnel Railroad Company and the said Terminal Underground Railroad Company were duly merged and consolidated under and in pursuance of the said chapter 582 of the Laws of 1880 and chapter 565 of the New York Laws of 1890 and article III of chapter 39 of the General Laws of the State of New York and the various acts amendatory of and supplementary to said statutes, especially under and in pursuance of chaptar 676 of the New York Laws of 1892 which was approved May 18th, 1892; and a joint agreement under the corporate seal of the three constituent corporations for the consolidation of said
18 three constituent corporations was duly entered into by the directors of the said three corporations. Said agreement prescribed the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation which was the Underground Railroad of the City of New York, the number and names of the directors and officers of such new corporation, who should be the first directors and officers thereof with their places of residence, the number of shares of the capital stock of such new corporation, the amount and par value of each share, and the manner of converting the capital stock of each of the said three constituent

corporations into that of the new consolidated corporation; how and when the directors and officers of such new corporations should be chosen and such other details as were necessary to perfect such new organization and the consolidation of said three constituent corporations. The stockholders of two-thirds of all the stock of each of such three corporations by a consent in writing, duly acknowledged as are deeds entitled to be recorded and endorsed upon said agreement of consolidation, duly signified their consent to the same. The said agreement of consolidation with said consents duly acknowledged as aforesaid was duly filed and recorded in the office of the secretary of State of New York at the city of Albany in the State of New York on October 2, 1896; and a duly certified copy and a duplicate original of said agreement and consents similarly duly executed and acknowledged by the said stockholders and directors was duly filed in the office of the clerk of the county of New York on October 6th, 1896. Thereupon, the said three constituent corporations were and became duly merged and consolidated in your orator The Underground Railroad of the City of New York, which thereupon came into existence and became incorporated and vested with all the privileges, property, rights, and franchises of the said three constituent corporations and became duly vested with the
19 rights and franchises of the said Central Tunnel Railway Company to construct an underground railroad and tunnel upon the route specified in the articles of association of said Central Tunnel Railway Company and to continue such proceedings as were necessary to perfect and to enforce said franchise.

At the time when said agreement and articles of consolidation and of incorporation were filed in the office of the secretary of State of New York as aforesaid a tax of one-eighth of one per centum of the capital stock of said Underground Railroad of the City of New York was duly paid by and on behalf of said corporation and its incorporators in pursuance of chapter 908 of the New York Laws of 1896 to the treasurer of the State of New York.

The articles of consolidation and incorporation of said Underground Railroad of the City of New York describe the route of said corporation as follows:

"4th. The length of said railroad, as nearly as may be estimated, "is not more than five miles, and the same is intended to be con- "structed from a point at or near the City Hall park, in said city of "New York, and running then northerly to and under Chambers "street, and through the block to and under Reade street to Elm "street, thence northerly through and under Elm, to and under "Spring street and Marion or Mulberry Sts., thence northerly "through the blocks and under the cross-streets to and under Great "Jones street, thence northerly through and under Astor place and "Eighth St., thence northerly and through the block to and under "Ninth street to Fourth Av. thence northerly through and under "Fourth avenue, to and under Forty-second street, to or near the "Grand Central depot, connecting with the Fourth Avenue Improve- "ment, with three connecting branches, the one forming a junction "with the main line at or near Thirty-third street, and run-

"ning in an easterly direction to the East river at or near Thirty-
"fourth Street ferry. The second forming a junction with
20 "the main line at or near the City Hall park, and running
"in an easterly direction to or near the East river, and thence
"southerly parallel with said river, and terminating at or near South
"ferry in said city of New York with stations at all the ferries on
"said line. The third commencing and forming a junction with
"the main line at or near City Hall park, and running thence west-
"erly under the streets and through the blocks to West street, and
"thence southerly parallel with West street, and terminating at
"or near South ferry in said city of New York, with stations at all
"the ferries on said line."

Subsequently thereto and on or about June 10, 1897, a map and profile of the said route and the remaining routes of said Underground Railroad of the City of New York was duly signed and certified by the president, the engineer and a majority of the directors of said corporation and duly filed in the office of the register of the city of New York.

VI. On April 9th, 1897, your orator, The Rapid Transit Underground Railroad Company, and a domestic corporation, was duly organized under and in pursuance of chapter 39 of the General Laws of the State of New York and the several acts amendatory thereof and supplemental thereto. In pursuance of said statute a certificate and articles of association and of incorporation of said corporation were executed, acknowledged and filed on said date in the office of the secretary of the State of New York, on April 9th, 1897, a duplicate original and a certified copy of said certificate and articles was duly filed in the office of the clerk of the county of New York. Said certificate stated the name of said corporation; the number of years it was to continue, namely ninety-nine (99) years, the kind of road to be built and operated; its length and termini; the name of the county in which it was to be located, the county of New York; the amount of its
capital stock which was one hundred thousand ($100,000)
21 dollars; the number of shares into which said capital stock
was to be divided, namely one thousand (1,000) shares; the names and post-office addresses of its directors who were not less than nine in number, who should manage its affairs for the first year; the place where its principal office was to be located; the names and post-office addresses of each of the subscribers to said certificate, who were fifteen in number, and the number of shares of stock in said corporation which each such subscriber agreed to take. Annexed to said certificate and taken as a part thereof was duly filed as aforesaid an affidavit of three of such directors of such corporation, which stated that ten per centum of the minimum amount of stock authorized by law had been actually in good faith subscribed thereto and paid in cash to the directors named in such certificate; and that it was intended in good faith to build, maintain and operate the road mentioned therein. Each statement in said affidavit and each statement in said certificate was and is true.

The length and termini of said railroad were stated in said certificate as follows:

"3rd. The kind of a road to be built or operated is that known "as a depressed or underground or tunnel railroad, or partly tunnel "and partly through an open cut, or both, except that portion of "the road located on Eleventh avenue, between 124th street and "134th street, and to extend and run underneath the ground, along "certain streets and through the blocks situated in the city and "county of New York, in the State of New York, as more particu-"larly described in paragraph number four thereof.

"4th. The length of said railroad, as nearly as may be esti-"mated, is ten miles, and the same is intended to be constructed "from a point at or near the Post-office building City Hall park, in "said city of New York, and running thence northerly under Park
" row and Centre street, and through the block to, and under
22 "Reade street, to near Elm street, thence northerly through
"and under Elm and under the cross-streets to, and under "Spring street and Marion or Mulberry streets, thence northerly "through the blocks and under the cross-streets to, and under Great "Jones street; thence northerly through and under Lafayette place "to, and under, Astor place and Eighth street, thence northerly and "through the block to, and under Ninth street to Fourth avenue, "thence northerly through and under Fourth avenue and under the "cross-streets to, and under, Forty-second street, to or near the Grand "Central depot, thence westerly through and under Forty-second "street, and the cross-streets to Broadway, thence northerly through "and under Broadway, and under the cross-streets to, and under, "59th street, thence northerly through and under the Boulevard "and Eleventh avenue, and under the cross-streets to 124th street, "thence northerly over and along the line of Eleventh avenue and "over the cross-streets to 134th street, thence northerly through and "under Eleventh avenue and under the cross-streets to, or near 155th "street."

On April 10th, 1897, your said orator duly paid to the treasurer of the State of New York the sum of one hundred twenty-five dollars ($125), which sum was one-eighth of one per centum upon the capital stock of your said orator. Said payment was made by said corporation and accepted by said treasurer as full payment of the tax and consideration for the privilege of the organization of your said orator and for the construction and operation of a railroad upon the route specified in its said certificate of incorporation and for the privilege of exercising all its franchises, in pursuance of chapter 908 of the Laws of the State of New York approved in the year 1896 and the other laws of the State of New York; and thereby and thereupon the State of New York entered into a contract with your orator
whereby the said State granted to your said orator the exclusive
23 right and franchise to construct and operate a railroad upon
the said route, saving the rights and privileges of the Underground Railroad of the City of New York. The said receipt was duly filed on April 10th, 1897, in the office of the secretary of state of New York and a duplicate original of said receipt was duly filed

in the office of the clerk of the county of New York on or about April 13th, 1897. Your orator The Rapid Transit Underground Railroad Company thereafter and up to the present time has duly continued its corporate existence; discharged all the obligations imposed upon it by the laws of the State of New York; paid taxes duly assessed against it by the city, county and State of New York; and your said orator is a tax-payer of the city, county and State of New York.

Thereafter and on or about October 11, 1897, your orator The Rapid Transit Underground Railway Company, made a map and profile of the route adopted by it in the county of New York namely the route specified in its said certificate of incorporation. Said map and profile was duly certified by the president and engineer of said corporation and by a majority of the directors of said corporation and filed in the office of the register of the city and county of New York. A duplicate original of said map and profile similarly certified was on the same date filed in the office of the clerk of the county of New York. Written notice of the time and place when and where such maps and profiles were filed and that such route passed over the land of the occupants of the same was duly given by said corporation to all actual occupants of the land over which the route of said railroad was so designated.

Subsequently thereto and on or about April 29th, 1897, your orator The Underground Railroad of the City of New York duly contracted for a valuable consideration with your orator The Rapid Transit Underground Railroad Company for the use of the
24 road and routes of the former by the latter corporation during the term of the corporate existence of the latter corporation; and said former corporation duly leased to said latter corporation the roads and routes and the rights and franchises of the former corporation for said term of years. Said contract further provided for a consideration in cash which was duly paid by the latter to the former corporation and for the exchange of the stock of the former corporation for stock in the latter corporation; which exchange was duly made. Said contract was duly ratified by the votes of all the directors and all the stockholders of both said corporations at meetings duly called for said purpose.

VII. On January 31st, 1891, a bill was signed by the governor of the State of New York, which purports to be a statute of said State and usually designated as the "Rapid-transit act of 1891." Said bill is hereinafter described as the rapid-transit act. Said bill is printed in the session laws of said State and is therein designated as chapter 4 of the Laws of 1891. Subsequently thereto, on May 22d, 1894, the governor of said State signed a bill designated as chapter 752 of the Laws of 1894 which purported to amend said "Rapid-transit act." The said bill signed in 1894 purported to amend section I of the said bill of 1892 so that the same should read as follows: "In each city having over one million of inhabitants, ac-
"cording to the last preceding national or State census, there shall
"be a board of rapid-transit railroad commissioners in and for such
"city, which shall consist of the mayor of such city, the comptroller

"or other chief financial officer of such city, the president of the "chamber of commerce of the State of N. Y., by virtue of his office, "and the following-named persons, to wit: William Steinway, Seth "Low, John Claflin, Alexander E. Orr and John H. Starin. The "members of said board shall be styled commissioners of rapid "transit. Vacancies which may take place in the offices so
25 "held by the persons specifically named herein as such com- "missioners shall be filled by a majority vote of the remain- "ing members of said board. The board thus constituted shall "have and exercise the specific authority and powers hereinafter "conferred also such other and necessary powers as may be requisite "to the efficient performance of the duties imposed upon said board "by this act."

Said bill, designated as chapter 752 of the Laws of 1894, provided that the said board of rapid-transit railway commissioners should cause the question, whether such railway or railways as were described in said two bills should be constructed by the city and at public expense, to be submitted to the vote of the qualified electors of the city within which such railway or railways were to be constructed; and certain formalities and conditions precedent to said election were therein prescribed. Said bill, in section 13 thereof, further provided that in case the majority of votes cast at such an election should be in favor of such municipal construction of said railway or railways, it should be the duty of said board within thirty days after the official declaration of the said vote to proceed to construct the said railway or railways. The said bill further provided that in case the majority of votes cast — power to grant the right to lay down railroad tracks to such person as they might elect and to grant to him the right to maintain and operate said tracks for a term of years not less than thirty-five nor more than fifty years. That the said railroad tracks might be constructed in underground subways or tunnels. That in case of such a popular election as was described in said bill the city of New York should advance the funds to construct such railroad tracks subways and tunnels. That for that purpose and for the purpose of paying the expenses of said commissioners and all legal expenses connected with said rapid-transit commission and said construction the city of New York should borrow money and issue bonds for the payment of the same

26 The so-called rapid-transit act and the bills purporting to amend the same further provide:

That the said rapid-transit commissioners should determine a route and general plan of construction for a rapid-transit railway or railways in the city in which it was appointed. In § 5 that a copy of the plans and conclusions adopted by that commission should be transmitted to the common council of the city where said rapid-transit railway was projected. That such common council should thereupon consider said plans and conclusions and vote upon a resolution to approve the same and consent to the construction of a railway or railways in accordance therewith. That upon the adoption of such a resolution by a majority vote of the members of

such common council and its approval by the mayor of the city "the said plans and conclusions shall be deemed to have been finally consented to and adopted, and such consents shall be deemed to be the consent of the local authorities of such city." That in case the consents could not be obtained of the property-owners along the line of the route or routes to the construction of a railway or railways upon which the approval of the local authorities had been thus given the said board should apply to the general term of the supreme court in the judicial district in which said railway was to be constructed for the appointment of "three commissioners to determine and report after due hearing whether such railway ought to be constructed and operated." That upon proof of due publication of notice of such application as prescribed in said rapid-transit act the said general term should appoint three commissioners for said purpose. That "the said commissioners shall determine after public hearing of all parties interested whether such railroad ought to be constructed and operated and shall report the evidence taken to said general term together with a report of their determination whether such road ought to be constructed and operated, which re-
27 port, if in favor of the construction and operation of such road, shall when confirmed by said court, be taken in lieu of the consent of the property-owners above mentioned." In § 6 that, after the consents of the local authorities and the authorization of the said general term had been obtained, said board should prepare detailed plans and specifications for the construction of a railway or railways in accordance with the general plan of construction previously adopted. That in case the people should determine by vote as provided in said rapid-transit act that any such railway or railways should be constructed for and at expense of such city after obtaining the consent of the local authorities of said city and of said general term in § 34 as set forth in bills designated as chapter 752 of the Laws of 1894 and chapter 529 of the Laws of 1895, that "as soon as such consents, where necessary, shall have been obtained, and the detailed plans and specifications have been prepared as provided in section six of this act, the said board, for and in behalf of said city, shall enter into a contract with any person, firm or corporation, which in the opinion of said board shall be best qualified to fulfil and carry out said contract, for the construction of such road or roads, upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions, not inconsistent with the aforesaid plans and specifications, as said board shall determine to be best for the public interests. And said board may contract for the construction of the whole road, or all the roads provided for by the aforesaid plans in a single contract, or may by separate contracts, executed from time to time, provide for the construction of parts of said road or roads, or for the construction at first of two or more tracks over a part or parts of such road or roads, and afterwards of one or more additional tracks over a part or parts of such road or roads,
28 as the necessities of said city and the increase of its population may in the judgment of said board require. * * *

"Such contract shall also provide that the person, firm or corporation so contracting to construct said road or roads, shall, at his or its own cost and expense, equip, maintain and operate said road or roads for a term of years to be specified in said contract, not less than thirty-five nor more than fifty years, and upon such terms and conditions as to the rate of fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interest, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board, provided, that in case the contract shall provide for construction at different times or at intervals of time of different parts of a road, or if the contract shall provide for the use of the contractor of an existing railroad as a part of a continuous route as aforesaid, then and in such case the board of rapid-transit railroad commissioners may in its discretion prescribe periods for the operation of the different parts of said road so that at one period of time in the future the board may be enabled to make a single operating contract or lease of the entire road. Such contract shall further provide by proper stipulations and covenants on the part of the said city, that the said city shall secure and assure to the contractor, so long as the contractor shall perform the stipulations of the contract, the right to construct and to operate the road as prescribed in the contract, free of all right, claim, or other interference, whether by injunction, suit for damages, or otherwise, on the part of any owner, abutting owner or other person. Such contract shall further provide that the person, firm or corporation so contracting to construct, maintain and operate said road shall annually pay into the treasury of said city, as rental for the use of said road, a sum which shall not, except as hereinafter provided,
29 be less than the annual interests upon the bonds to be issued by said city for the construction of said road as hereinafter provided for, and in addition to said interest, a further sum which shall be equal to a percentage of not less than one per centum upon the whole amount of said bonds, provided, that in estimating such annual interest and additional percentage there shall be deducted from the amount of said bonds the amount thereof issued to pay for rights, terms, easements, privilege or property other than lands acquired in fee. Such rental and the term for the operation of said road shall begin as to said road or any section thereof when the same shall be declared by the board of rapid-transit railroad commissioners to be completed and ready for operation. Said contract may also provide for a renewal or renewals of the lease of said road upon the expiration of the original term and of any renewals of the same upon such terms and conditions as to said board may seem just and proper, and may also contain provisions for the valuation of the whole or a part of the property of said contracting person, firm or corporation, employed in and about the equipment, maintenance and operation of said road, and for the purpose of the same by the city, at such valuation, or a percentage of the same, should said lease not be so renewed at any time. Said contract may provide for the construction of said road

in sections, and except as herein otherwise provided, shall specify when the construction of said road, or sections of the same shall be commenced, and in each case the date of completion. It shall also state the date on which the operation of the road, or of any section thereof, shall commence. The person, firm or corporation so contracting for the construction, equipment, maintenance and operation of said road, shall give a bond to said city, in such amount as said board of rapid-transit railroad commissioners shall require, and with sureties to be approved by said board, who shall justify in the aggregate in double the amount of said bond."

30 The said rapid-transit act purported to give the said board unlimited authority to select the contractor to whom the right to construct and to operate said railroad was granted by said rapid-transit board as aforesaid; and purported to authorize all of the members of said board to receive compensation from the funds of the city of New York, which has been done by them.

VIII. The said rapid-transit act as originally approved in 1891 and as subsequently amended makes no provision for the payment to your orators, and makes no provision for the payment to the said Central Tunnel Railway Company, and makes no provision for the payment to any one for any franchise which is not appurtenant to lands, the fee of which is taken under color of said "rapid-transit act." The said "rapid-transit act" makes no provision for the payment for any property of your orator, nor for the payment for any property of the said Central Tunnel Railway Company, nor for the payment for any property of any of the constituent corporations which were merged and consolidated in your orator, The Underground Railroad Company of the City of New York as aforesaid. The said "rapid-transit act" purports to provide for the payment of compensation to the owners of property, franchises, easements and privileges which are appurtenant to lands which are intended to be acquired under the said rapid-transit act, and which lands are described in certain maps which said rapid-transit act directs to be filed by the said board of rapid-transit commissioners. Said "rapid-transit act" in sections 45 and 46 thereof, provides for the appointment of commissioners of appraisal and the filing of an oath by the said commissioners of appraisal in the office of the clerk of the county in which the city, where said rapid-transit commissioners act, is situated; and in section 47 thereof upon filing said oath in the manner and form aforesaid, "the said city shall be and be-

31 "come seized and possessed in fee or absolute ownership of all "those parcels of property, rights, terms, franchises, easements "and privileges which are in the maps or plans and memoranda "referred to in section 40 of this act, described as parcels of property, "the rights, franchises, easements or privileges which are to be ac-"quired, and also shall become seized and possessed of all the rights, "terms, franchises, easements or privileges appurtenant to any lots "or parcels of property indicated on said maps or plans as parcels in "regard to which it is deemed necessary to acquire such rights, "terms, franchises, easements or privileges or the said rights, terms, "franchises, easements or privileges shall be extinguished as the

"case may be and the said board for the said city may immediately "or at any time or times thereafter take possession or enter into the "enjoyment of the said property, rights, terms, franchises, easements "and privileges or of any part or parts thereof without any suit or "proceeding at law for that purpose, and the said board for the said "city, or any person or persons acting under their or its authority "may enter upon, use, occupy and enjoy in perpetuity all the parcels "of property and all the rights, terms, franchises, easements or privi- "leges appurtenant to any of the parcels of property and all rights, "franchises, easements and privileges, described on said maps or "plans or in said memoranda for any of the purposes authorized "and provided for by this act. But on such filing of the said oath "the said city shall be and become forthwith liable to the respective "owners of the several parcels of property and several rights, terms, "franchises, easements and privileges appertaining thereto, and of "the said rights, franchises, easements and privileges acquired as "aforesaid for the true and respective value thereof, together with "interest thereon from the time of filing the said oath, provided, "however, that no such interest shall be payable to any owner of "any such property, right, term, franchise, easement or privi-
32 "lege during any period during which the said city or said "board of rapid-transit railroad commissioners may by any "resistance, whether by legal proceedings or otherwise of such "owner or with his authority, be prevented from taking possession "thereof or enjoying the same; and provided further, that no action "shall be brought to recover the amount of such value or interest "unless within eighteen months after the filing of such oath, a report "shall not have been duly made by commissioners of appraisal as "herein provided, or such report shall not have been confirmed by "the supreme court as herein provided, so that the said city shall be "liable to forthwith pay the amount by such report ascertained to "be due for such value or interest."

No part of said rapid-transit act makes any provision for the payment of compensation to any owner of property seized or used by said city under color of said rapid-transit act before said city takes possession of the same.

Section 11 of article VIII of the constitution of the State of New York provides as follows: "No county, city, town or village shall "hereafter give any money or property or loan its money or credit "to or in aid of any individual, association or corporation or be- "come directly or indirectly the owner of stock in or bonds of any "association or corporation; nor shall and such county, city, town "or village be allowed to incur any indebtedness except for county, "city, town or village purposes. This section shall not prevent such "county, city, town or village from making such provision for the aid "or support of its poor as may be authorized by law. No such county "or such city whose present indebtedness exceeds 10 per centum of "the assessed valuation of its real estate subject to taxation shall be "allowed to become indebted in any further amount until such in- "debtedness shall be reduced within such limits. This section shall

"not be construed to prevent the issuing of certificates of in-
33 "debtedness or revenue bonds issued in anticipation of the
"collection of taxes for amounts actually contained or to be
"contained in the taxes for the year when such certificates or
"revenue bonds are issued and payable out of such taxes. Nor shall
"this section be construed to prevent the issue of bonds to provide
"for the supply of water, but the term of the bonds issued to pro-
"vide for the supply of water shall not exceed 20 years and a sink-
"ing fund shall be created on the issuing of the said bonds for their
"redemption, by raising annually a sum which will produce an
"amount equal to the sum of the principal and interest of said
"bonds at their maturity. The amount hereafter to be raised by
"tax for county or city purposes in any county containing a city of
"over one hundred thousand inhabitants or any such city of this
"State, in addition to providing for the principal and interest of ex-
"isting debts shall not in the aggregate exceed in any one year 2
"per centum of the assessed valuation of the real and personal estate
"of such county or city, to be ascertained as prescribed in this sec-
"tion in respect to county or city debt."

The population of the city of New York exceeds, and at the times mentioned herein has exceeded, and according to the last preceding State and national census, and according to the State census last preceding May 22d, 1894, and according to the national census last preceding May 22d, 1894, the population of said city exceeded one million inhabitants; and there are more than one million inhabitants in the said city of New York who are also inhabitants of the borough of Manhattan and county of New York. According to the last preceding State census, and according to the State census last preceding May 22d, 1894, and according to the last preceding national census, and according to the national census last preceding May 22d, 1894, the population of no city in the State of New York except the city of New York has exceeded one million inhabitants.

34 Prior to the commencement of the construction of the underground railroad hereinafter described and prior to the attempt to incur on behalf of the city of New York any indebtedness for such construction, the indebtedness of the city of New York, exclusive of certificates of indebtedness and revenue bonds issued in anticipation of the collection of taxes and exclusive of the issue of bonds to provide for a supply of water, exceeded ten per centum of the assessed value of the real estate of the city of New York subject to taxation; and the same is now the case.

The said city of New York is insolvent. Any indebtedness and any claim against the city of New York attempted to be created for the benefit of property-holders upon the route of said underground railroad will be, and any such indebtedness or claim heretofore sought to be created on their behalf is and has been null and void for the reason that the same is and has been forbidden by the said article of the constitution of the State of New York hereinbefore quoted.

The said provision of the said rapid-transit act for the payment of compensation to persons whose property is taken under color of

said act is absolutely void, inasmuch as the same is an infringement of the provision of the fourteenth amendment of the Constitution of the United States, which provides that "no person shall be deprived of property without due process of law;" and the whole of said rapid-transit act is likewise an infringement of said article and of said fourteenth amendment of the Constitution of the United States and is void for the same reason, since it attempts to authorize the acquisition by the city of New York of the title and possession to real and personal property without making any adequate provision for the payment of its value to the owners of the same.

In the matter of Rapid Transit Railroad Commissioners, 5 App. Div. 290, 294, 295, 296, 297, the appellate division for the first department of the supreme court of the State of New York, said, speaking through Van Brunt, P. J.

35 "In a great work like the one proposed it is impossible to "foresee all contingencies, and as the rapid transit commis- "sioners have averred their intention to go as far as the debt limit "will allow in the making of their building contract, there will be no "question but that the boundary will be overstepped because of the "very nature of the enterprise. Besides, by the terms of the act, "the city is bound to indemnify the contractor against many and "divers things as to the expense of which no estimate can be "given * * *.

"There is no restriction upon the rapid-transit commissions as "to the amount they can render the city liable for, a power never "before given to any local board or body, and they may involve the "city in an amount of obligation which would absolutely ruin and "destroy its credit, and bring about as great a disaster as was "occasioned by the collapse of the Panama canal, and all other "public improvements would necessarily be stopped.

"It has been suggested that under the provisions of section 34 of "the rapid-transit act, added to chapter 4 of the Laws of 1891 by "section 9 of chapter 752 of the Laws of 1895, the board of rapid- "transit commissioners is empowered to contract for the construc- "tion of the whole road, or all the roads provided for by their plans, "in a single contract, or may by separate contracts, executed from "time to time, provide for the construction of parts of said road or "roads, or for the construction at first of two or more tracks over "a part of such road or roads, and afterward of one or more "additional tracks over a part or parts of such road or roads as the "necessities of said city or the increase of its population may, in the "judgment of said board, require; and that under this power the "commissioners may delay the construction of sections of the road "until the assessed valuation of the real estate of the city shall "increase to such a sum as would allow the incurring of additional "indebtedness upon the part of the city over and above that which "is now permitted by the constitution.

36 "In respect to this suggestion it would seem to be sufficient "to say that the subsequent provisions of the section in ques- "tion appear to be inconsistent with the right to make entirely sepa- "rate contracts because they require that the contract of construction

"should also provide that the person, firm or corporation so con-
"tracting to construct said road or roads shall, at his or its own cost
"or expense, equip, maintain and operate said road or roads for a
"term of years to be specified in said contract. Hence, if the road
"is to be constructed in sections, there must be sectional provisions
"in regard to operation, and the system would be anything but
"uniform, and uniformity is an absolute necessity.

"This necessity is contemplated by the provision subsequent to
"the first quoted in which it is said that the board may also, in a
"contract for a part of such work insert a provision that, at a future
"time, upon the requirement of the board, the contractor shall
"construct the remainder, or any part of the remainder of said road,
"as the growth of the population or the inter-sts of the city may, in
"the judgment of the board, require; and may, in such contract,
"insert a provision of a method for fixing and ascertaining at such
"future time the amount to be paid to the contractor for such ad-
"ditional construction, and, to the end of such ascertainment, may
"provide for arbitration or for determination by a court for the
"amount of such compensation, or of any other detail of construc-
"tion which shall not be prescribed in the contract, but which shall
"be deemed necessary or convenient by said board. If this power
"is resorted to the obligation is created at the time of the original
"contract, the ascertainment of its amount only being deferred;
"and, hence, it comes within the present prohibition of the consti-
"tution.

"It is to be further observed that the sectional plan assumes
"that the board of rapid transit shall mortgage for a con-
37 "siderable period of years, in the future, the debt-creating
"capacity of the city. Under this scheme it would be impos-
"sible for the city to provide for the purchase of land for, and the
"building of public schools, the improvement of docks, the furnish-
"ing of additional water supply, and the establishment of additional
"parks—all improvements of a permanent character, payment of
"which may properly be provided for by bonds to be payable in the
"future—and the city would lie helpless, bound hand and foot by
"this octopus of debt created by these rapid-transit contracts."

In the same case Mr. Justice Rumsey, said (at pp. 300, 301, 307, 308).

"In this consideration we are to throw out the question of profit
"to the city. By the terms of the contract the city is not expected
"to receive any profit from the operation of this road. The benefits
"which it must derive are entirely consequential and such as arise
"from the increased convenience to great numbers of its inhabitants,
"and the probable enhancement of values of property in certain
"portions of the city. The only money which the city is at all
"likely to get from the operation of the road is the annual interest
"upon certain portion of the bonds which it is required to issue, and
"one per cent. per annum in addition for a sinking fund to be pay-
"able after a certain time. It is quite clear that the sum to be paid
"to the city will not recompense it for the interest upon the bonds
"which it is to issue. These bonds are to bear interest at the rate

"of three and one-half per cent. per annum. The rental is to be "estimated not upon all the bonds which shall have been issued, but "upon such of them as shall be left after deducting the bonds which "shall have been issued to pay for rights, terms, easements, privi- "leges or property other than lands acquired in fee. So that it will "be seen that the amount of bonds issued by the city will be very
"much larger than the total amount of those upon which the
38 "interest by way of rentals shall be paid. In addition to
"that must be considered the sum which the city may be "compelled to pay by reason of its liability for interference and "damages spoken of above, the amount of which cannot be es- "timated. * * *

"It is plain that the city is not now in a position to incur any "such indebtedness. The assessed valuation of the city is something "over $1,646,000,000. The actual debt now existing, not including "outstanding obligations, is something over $100,000,000. The limit "of the constitutional power to incur indebtedness is $164,600,000, "leaving as the amount of indebtedness which the city may incur "above its present indebtedness, $55,000,000. But we are bound to "know that outstanding obligations have consumed a considerable "portion of that amount. The bonds which the city must issue for "obligations already incurred is upwards of $19,000,000, which "would leave only $36,000,000 that could be issued for this pur- "pose. It is conceded on all hands that such a sum is entirely "insufficient for the completion of this work. But if even that "amount of bonds should be issued, thus bringing the indebtedness "of the city up to its full limit, there is no doubt that the results "might be quite serious. From that time on all expenses, however "onerous, could be met only by taxation. In whatever public en- "terprise it should be necessary to engage, from any unforeseen ex- "igency which might arise, there would be no power to incur any "indebtedness, however useful the existence of such a power might "be. If it should be necessary to build school-houses, or to improve "the water front, or to repave a street, each of those things could be "done only upon the condition that the money to pay for it should "be at once raised by taxation. The serious consequences of such "a condition of affairs can easily be understood. The actual neces- "sity of leaving some margin of the power to incur indebtedness so
"that the city may provide for unforeseen emergencies must
39 "be conceded, and the propriety of undertaking any enter-
"prise which would take away that power must be seriously "questioned. But if as is quite possible the work should prove con- "siderably more expensive than the estimates, the consequences "would be much more serious. In that case, undoubtedly, the work "must stop, or it could be continued only by a resort to direct tax- "ation to pay for it, which, added to the necessary taxation for the "expenses of the city government, might be exceedingly oppressive. "If taxation should not be resorted to, the necessary result would "be that the work would come to an end, and probably the money "already invested would be totally lost."

In matter of Rapid Transit Commissioners, (23 App. Div. 472, 473, 474, 475), the same court said through Van Brunt, P. J.:

"The report of the supreme court commissioners concedes, and the "arguments of the counsel in favor of the application seem to admit, "that if the total cost of the building of the proposed rapid-transit "road is to be deemed as incurred by the city at the time of the "making of the contract, and there is added to this all the indebt- "edness of the city of New York then existing, whether funded or "contingent, and its obligation to assume, on the first day of January "of the coming year, the indebtedness of the adjacent cities and "counties, as provided by the new charter, the limit of indebtedness "will be exceeded. Whether any of these elements can be excluded "in the determining as to the legality of any contract which the "rapid-transit commissioners might make or propose to make for "the building of this road, presents serious questions of law which "in my judgment ought not to be determined upon this applica- "tion, for the reason that if the court upon this application should "come to a conclusion upon these questions adverse to the legality "of such proposed contract, no review could be had of its determina- "tions although involving only questions of law.

40 "It is stated in the report of the supreme court commission- "ers that the suggestion that no contract for the construction "of the road can be made without *ipso facto* creating a debt to the "full extent of its estimated cost is not reasonable. The question of "the reasonableness of a constitutional inhibition is not open to dis- "cussion, and an examination of the authorities of this State upon "the question of what constitutes indebtedness or debts may show "that this unreasonable proposition has very respectable authority, "viz., our court of appeals.

"It cannot for a moment be assumed in considering these ques- "tions that independent and separate contracts of construction with "different contractors could, from time to time be entered into, for "the reason that every contract for construction must necessarily "embrace a contract for the operation of the line by the construct- "ing contractor, and to have the operation of the rapid-transit sys- "tem controlled by divers and various operators would of itself "necessarily absolutely condemn the scheme. It would seem, there- "fore, that the contract initiating the work must also contain pro- "visions for its completion and final operation. It is proposed by "deferring construction and payment to throw (as it is stated) the "indebtedness into future years, and thus obviate the constitutional "objection.

"It is further urged that a considerable amount of the apparent "indebtedness of the city of New York is only imaginary and not "real; that, for example, assessment bonds are outstanding which, "it is anticipated, will in the future be paid by the receipt of assess- "ments for the benefit levied upon neighboring property; that land- "acquired for Croton aqueduct purposes which are to be used only "for subsurface constructions, may be sold for nearly what was "paid for them, and that indebtedness, thus reduced, and that the "excess of indebtedness of the adjacent cities and counties over the

"limit provided by the constitution is not to be charged
41 "against the city at this time, because the actual assumption
"has not taken place, although the obligation to assume at
"present exists. *Whether these devices in respect to the contract and "these theories as to the indebtedness of the city, will finally obtain, ought "to depend upon the decision of our court of last resort, and should not "be determined as has already been stated in this proceeding, where they "cannot be reviewed.*"

These questions have never been considered by the New York court of appeals.

In the same case Mr. Justice Ingraham dissented and said among other things, (at p. 486),

"In the case of Berlin Iron Bridge Co. *v.* City of San Antonio "(62 Fed. Rep. 882) the same construction was given to a provision "of the constitution of the State of Texas, and it was held that a "contract to build a bridge, made by a city, by which the city obli-"gated itself to pay a sum of money for the building of such bridge, "created a debt, and that such contract was not binding upon the "city, being prohibited by the constitution of the State of Texas, "which provided that no debt shall ever at any time, be created by "any city, except upon conditions which were not complied with in "the execution of the contract in question."

IX. By the filing of its articles of association in the office of the secretary of state of New York as above set forth and by the other proceedings connected with its incorporation and its corporation action the said Central Tunnel Railway Company entered into a contract with the State of New York which bound and obliged the State of New York to secure to and give to the said Central Tunnel Railway Company the exclusive right and franchise to construct and operate an underground railroad and tunnel upon the route specified in its articles of association. The said contract and the said franchise are property, and by the proceedings of merger and consolidation hereinabove set forth they have been assigned to and vested in your orator who holds the same as its prop-
42 erty. The said rapid-transit act is an impairment of the obligation of that contract, and consequently the same is void as a violation of the Constitution of the United States. The said rapid-transit act is likewise void as an infringement of the fourteenth amendment of the Constitution of the United States because it takes the property of your orator for a private use without compensation and without due process of law.

X. By their said incorporation and the filing of their articles of association in the office of the secretary of state of New York and by the other proceedings connected with their incorporation and their corporate action, your orators entered into a contract with the State of New York which bound and obligated the State of New York to secure to and give to your orators the exclusive right and franchise to construct and operate an underground railroad and tunnel upon the said route specified in its articles of association. The said rapid-transit act is an impairment of the obligation of that contract, and consequently the same is void as a violation of the Constitution of the

United States. The said rapid-transit act is likewise void as an infringement of the fourteenth amendment of the Constitution of the United States because it takes the property of your orators for a private use without compensation and without due process of law.

XI. Section 10 of article VII of the constitution of the State of New York provides: "Neither the credit nor the money of the State "shall be given or loaned to or in aid of any association, corpora- "tion, or private undertaking." The said rapid-transit act gives and loans the credit of the State of New York to a private undertaking, namely, the construction and operation of railroads by the contractor with said rapid-transit board. The said rapid-transit act is for that reason also unconstitutional and void and a violation of that provision of the State constitution.

43 XII. Section 18 of article III of the constitution of the State of New York provides as follows: "The legislature "shall not pass a private or local bill in any of the following cases." Amongst the cases therein enumerated in which the legislature is forbidden to pass a private or local bill are included the following: bills "granting to any corporation, association, or individual the "right to lay down railroad tracks;" and bills "granting to any "private corporation, association or individual any exclusive privi- "lege, immunity or franchise whatever."

The said so-called rapid-transit act virtually and in effect grants to a private individual, namely, to the person who makes a contract with said city of New York through said rapid-transit commission, the right to lay down railroad tracks. The said rapid-transit act also grants to such individual an exclusive privilege, immunity and franchise. It is claimed, however, by the defendants herein that the right to lay down said railroad tracks granted by said rapid-transit act is granted not to any private corporation or individual but to the city of New York. If that be the correct construction of said act, said act is still void, as a violation of said article in said constitution, inasmuch as the city of New York is a public corporation, and is so described in the statutes of the State of New York and by the common law which existed prior to the adoption of the constitution of the State of New York. The omission of the adjective "private" from the clause in said constitution forbidding the "granting to any corporation, association or individual the right to "lay down railroad tracks" together with the use of the said adjective "private" in the immediately succeeding clause of the same section, which forbids the "granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever," shows clearly that it was the intention of the said constitution and of the people of New York when the same was adopted

44 to forbid the grant to any corporation, public or private, of the right to lay down railroad tracks.

XIII. Since the approval by the governor of the State of New York of the bill designated as chapter 752 of the Laws of 1894, which named certain individuals as members of the board of rapid transit and as commissioners of rapid transit, William Steinway has died, and Seth Low and John Claflin have resigned from the board which

said bill thus attempts to create as aforesaid. The other members of said board have gone through the form of electing to fill the vacancies in said board thus and otherwise created the defendants Woodbury Langdon, George L. Rives, and Charles L. Smith. The defendant, Morris K. Jessup, has since been elected by the chamber of commerce of the State of New York as president of the such chamber of commerce. The said persons who have been thus in form elected to fill the vacancies in said board have since claimed the right to act as members of said board and are now acting as such.

Section 2 of article X, constitution of the State of New York, provides as follows: "All city, town and village officers whose election "or appointment is not provided for by the constitution shall be "elected by the electors of such cities, towns and villages or of some "division thereof, or appointed by such authorities thereof as the "legislature may designate for that purpose."

The said defendants except the mayor and comptroller who are members of and constitute the rapid-transit commission, claim to act and they are discharging the duties of city officers, and the duties, powers and functions which the said rapid-transit act purports to give them are the duties, powers and functions of city officers. None of them except said mayor and comptroller has been elected by the voters of the city of New York or elected or appointed by any municipal authority. No appointment to said commission could lawfully or constitutionally be made under the constitution of the State of New York and under the fourteenth amendment of the Constitution of the United States except by the election of the electors of the State of New York or by appointment of the municipal authorities of the city of New York duly elected by the people of the city of New York. The authority claimed by said commissioners and which they have sought to exercise to fill vacancies in their body, and to expend the funds of the city of New York both before and since said vacancies occurred, and the authority that said act purports to grant to them so to do, is an attempt to create a close corporation and to otherwise proceed in a manner forbidden by the constitution of the State of New York, and in a manner forbidden by the fourteenth amendment of the Constitution of the United States and is not "due process of law."

As said by the New York court of appeals speaking through Judge Cullen in the case of Fox against the Mohawk and Hudson River Humane Society, (165 N. Y. 525), "It is in substance devolving "the choice of public officers on a few citizens and possibly persons "not citizens, while under the constitution, all public officers must "be elected or appointed by other public authorities, and thus trace "their title to power and authority either immediately or immedi-"ately back to the sovereign in this country, the people." By the death and resignations above described said board of rapid-transit commissioners is without a quorum and could not legally act, even if the same had been legally created and constituted until said vacancies had been filled by persons legally appointed. If the said rapid-transit act is not a local bill, said rapid-transit act is further

void for the reason that it appoints persons who are citizens and residents of the city of New York officers of other cities in the State of New York.

46 XIV. Under color of said rapid-transit act the said board of rapid-transit railway commissioners has determined upon the construction of an underground railroad in the city of New York upon the route specified in the articles of association and said maps of the said Central Tunnel Railway Company and of your orators. Said board has adopted and projected general and detailed plans and specifications for the construction of such an underground railway or railways. The plans and specifications thus adopted by said board were prepared by Mr. William E. Worthen and John Bogert, engineers who had formerly been in the employ of said Central Tunnel Railway Company, and they were substantially the same plans and specifications for an underground railway upon said route that had previously been adopted and projected for the construction of the railroad and tunnel of the Central Tunnel Railway Company and of your orators. The common council, the mayor, and the local authorities of the city of New York in accordance with the provisions of the constitution of the State of New York and in accordance with the provisions of said rapid-transit act have duly given their consent to the construction of an underground railroad and tunnel upon the route specified in the articles of association and said maps of the said Central Tunnel Railway Company and upon the said Central Tunnel Railway Company and of your orators. The appellate division of the supreme court for the first department has upon the application of said rapid-transit board made in accordance with and under color of said rapid transit act appointed three commissioners to determine after a hearing of all parties interested whether an underground railroad and tunnel ought to be constructed and operated upon the route specified in the articles of association and said maps of the said Central Tunnel Railway Company and of your orators. Said commissioners after

47 duly hearing all parties interested in accordance with the said constitution and the said rapid-transit act have duly determined that such a railroad and tunnel should be constructed and operated upon said route. Their determination in accordance with said constitution and the said rapid-transit act has been duly approved by the said court and has been taken in lieu of the consent of the property-owners of property bounding upon said route. The date of the approval of said court was on or about April 6, 1898.

Thereupon, by the entry of such order, said appellate division perfected and confirmed as your orators are informed and believe the right of your orators and the exclusive franchise of your orators to construct a street railroad and tunnel upon said route. But the said defendants by force and threats have hitherto prevented your orators from constructing the same.

Thereafter and on or about February 24, 1900, said rapid-transit board under color of said rapid-transit act entered into a contract with the defendant John B. McDonald by which said board purported

to bind the city of New York to pay to said defendant McDonald the sum of thirty-six millions five hundred thousand (36,500,000) dollars for the construction of an underground railroad and tunnel in the city of New York over the said route to which an exclusive right and franchise has been acquired by your orators as aforesaid and purported to grant to said defendant McDonald the right to operate a railroad upon said route for the period of fifty years with the right to renew the same for a further period of twenty-five years.

XV. Said rapid-transit contract was entered into by mistakes of fact and law on the part of the said rapid-transit commissioners and on the part of the city of New York; and by fraud, imposition and undue influence, practiced upon them by the said defendant John B. McDonald and by the said Rapid Transit Subway Construction Company and by persons with great political influence in the city of New York, some of whom were city officers, who were secretly interested in the said contract and in the said Rapid Transit Subway Construction Company and who dominated the
48 action of the persons who executed said rapid-transit contract on the part of the city of New York. Amongst other mistakes on the part of said rapid-transit board and said city of New York was the following material mistake under the influence of which said rapid-transit contract was executed. Said board and said city believed when said contract was executed that sections 3 and 14 of the labor law of the State of New York, namely, chapter 415 of the Laws of 1897, were valid legislative enactments, which were not repugnant to the constitution of the State of New York; and they believed the statement and promise, which were made to them by said John B. McDonald before said rapid-transit contract was executed, that he intended to and that he would obey said sections of said labor law, pay and compel the payment of the prevailing rate of wages to all workmen upon said railroad subway and tunnel, and use no stone in said construction that had been worked, dressed, or carved outside of the State of New York. For that reason a clause was inserted in said rapid-transit contract wherein and whereby said McDonald promised to obey said sections of said labor law and it was provided that in case of his disobedience to the same said contract should be null and void and the compensation for said construction was fixed in said contract at an amount at least twenty (20) per centum in excess of the price at which the same would have been fixed had said clause not been inserted in said contract and had said promise and representation not been made by said defendant McDonald. When he made said promise and representation and before said rapid-transit contract was executed, said defendant McDonald had been advised by his counsel that said sections of said labor law were unconstitutional and void and that said clause in said contract was not binding upon him, and he intended not to comply with nor to obey said sections of said labor law and said clause of said rapid-transit contract. Sub-

sequently to the execution of said rapid-transit contract he
49 combined with other contractors and procured the institution and argument by his counsel of two test cases before the court of appeals of the State of New York in which said court held that parts of said sections in said labor law were unconstitutional and void and that similar clauses in contracts with the city of New York were not binding and could be violated and disobeyed without prejudice to the clauses in such contracts that were beneficial to the contractors; and he has since violated and disobeyed and he intends in the future to violate and disobey said sections of said labor law and said clauses in said rapid-transit contract, and laborers are and have been working more than eight hours a day upon said work. Said rapid-transit commissioners before awarding said rapid-transit contract to said defendant McDonald, went through the form of issuing an invitation for proposals and bids for said contract, in accordance with the draft of said contract included in said invitation by them. Before said rapid-transit contract was executed they secretly agreed with said defendant McDonald that the terms of the same would be modified so as to diminish by one-half the security for the performance of the said contract, required from the said McDonald in the draft of the contract as originally submitted and as incorporated in said invitation; and upon the same day that the said rapid-transit contract was executed an agreement was made purporting to be a modification of said contract in that respect; and no security in accordance with the original contract and the original invitation to submit proposals and bids for said contract has been given by the said McDonald or by any one. The said agreement modifying said contract was in violation of the laws of the State of New York, and the circumstances of the execution of the same make it void. Had it been announced in the said invitation to contract that said rapid-transit contract would be thus modified
50 and that the security for its performance would be thus diminished, other contractors would have offered to accept said contract for much less compensation than is under the provisions of said contract to be paid to the said defendant McDonald. The said defendant McDonald and the Rapid Transit Subway Construction Company and the persons who own the legal and equitable interests in the stock and control the said construction company have procured through persons who represent them the organization of a corporation named the Subway Realty Company; and they own the equitable and controlling interest in the stock of said realty company. In the name of said Subway Realty Company they have been engaged in and they threaten to engage in the purchase of real estate necessary for the construction and operation of said railroad for the purpose of leasing or selling the same or parts thereof to the city of New York at an exorbitant price. Such conduct by him and by them is a violation of the express and implied terms and conditions of said rapid-transit contract. Said rapid-transit contract is for these and other reasons void and not binding upon the city of New York.

XVI. Said contract and the purported right to said lease have been

assigned by said McDonald with the consent of said rapid-transit commissioners to the defendant, The Rapid Transit Subway Construction Company, which is a domestic corporation organized under the business corporation law of the State of New York; a copy of the articles of incorporation of which is hereto annexed, marked C; and which has no power under said law nor under its articles of incorporation either to construct or to operate a railroad. Since its incorporation the said Rapid Transit Subway Construction Company has applied to the legislature of the State of New York for authority to construct and operate said railroad, but said legislature has refused to grant to the said Rapid Transit Construction Com-
51 pany any authority either to construct or to operate that or any railroad. The said underground railroad is now in process of construction by said defendants McDonald and The Rapid Transit Subway Construction Company upon the route to which your orator and the predecessor of your orator have an exclusive right and franchise as aforesaid, and they have taken exclusive possession of the said route in defiance of the rights of your orators as aforesaid. Large sums of money have already been paid said last-named defendants for such construction by the city of New York and the comptroller and other officers of the same.

XVII. By the law in force in the State of New York the right to construct, and the right to operate a railroad is a franchise, which cannot exist nor be exercised without express statutory authority. The rule and policy of the State of New York is to permit the exercise of such a franchise by no person except a corporation organized under the railroad laws or transportation corporation laws of said State. The courts of the State of New York have established the rule of statutory construction in that State, that no general language in a statute, even though when literally construed it might be taken to grant such a right or such a franchise to an individual, or to a natural person, as well as to a corporation or an artificial person, shall be given that interpretation; but that such a grant in general language shall be confined to corporations organized under the railroad laws, or laws concerning transportation corporations. For example, it has been held that a statutory recognition of the right to lease a railroad "to any person or persons" does not refer to, nor recognize a lease of a railroad to a private individual.

The railroad laws and the laws authorizing the incorporation of transportation corporations, and all laws authorizing the construction and operation of railroads in said State, provide that the
52 persons who construct and operate railroads therein shall be corporations which shall possess a specified amount of paid-up capital proportioned to their mileage; that they shall be subject to the supervision of specified State officers; and that they shall observe certain regulations for the protection of passengers, neighboring land-owners and the public at large, for violations of which these laws subject them to specific penalties. No such provisions are contained in said rapid-transit act. If said rapid-transit act grants or purports to grant the right to construct or the right to operate a railroad to a natural person or to an individual who may

contract with said rapid-transit commissioners, or to any corporation not organized under the railroad laws nor under the laws concerning transportation corporations in said State, said rapid-transit act denies to your orators and to the corporations operating railroads and to those who have constructed and which are about to construct railroads in that State, and to the persons who intend or desire to organize corporations for that purpose and denies to all other persons in said State, except such contractor with said rapid-transit commissioners and his assigns, the equal protection of the laws of the State of New York, and the same is void as a violation of the fourteenth amendment to the Constitution of the United States. The action of said rapid-transit commissioners and of the city of New York in making such a contract with said John B. McDonald and in recognizing and consenting to his assignment of that contract to the said Rapid Transit Subway Construction Company, which was organized under the business corporation law of that State for the purpose of constructing and operating said rapid-transit railroad and not under the railroad laws nor under the transportation corporation laws of that State, is, as said by the Supreme Court of the United States, speaking through Mr. Justice Matthews in Yick Wo *vs.* Hopkins (118 U. S. 356, 373, 374), irrespective
53 of the question whether such contract is authorized by the rapid-transit act, an application of that rapid-transit act by the public authorities charged with its administration "and thus "representing the State itself, with a mind so unequal and oppres- "sive as to amount to a practical denial by the State of that equal "protection of the laws which is secured to" your orators, as to all "other persons" by the broad and benign provisions of the four- "teenth amendment to the Constitution of the United States. "Though the law itself be fair on its face and impartial in appear- "ance, yet, if it is applied and administered by public authority with "an evil eye and an unequal hand so as to practically make unjust "and illegal discriminations between persons in similar circum- "stances, material to their rights, the denial of equal justice is still "within the prohibition of the Constitution."

XIX. The said defendants John B. McDonald and The Rapid Transit Subway Construction Company threaten to, and unless enjoined by this honorable court they will complete the construction of an underground subway tunnel and railroad upon the route specified in the articles of association and said map of the Central Tunnel Railway Company and of your orators, the exclusive right and franchise to construct which is owned by your orators as aforseaid; and they threaten to, and unless enjoined by this honorable court, they will operate a railroad upon said route. If allowed to complete the construction of said railroad said defendants will make it impossible for your orators to construct and to operate a railroad upon said route as aforesaid, and they will render valueless and destroy the said franchise owned by your orators aforesaid. The defendants The City of New York, The Mayor and Comptroller of the City of New York, and the defendants who are or claim to be rapid-transit commissioners, and each of them, threaten to, and unless enjoined by this hon-

orable court they will assist said defendants McDonald and
54 The Rapid Transit Subway Construction Company in the construction and operation of said underground railroad; and they threaten to, and unless enjoined they will prevent your orators from constructing and from operating the said railroad specified in the articles of association and said map of said Central Tunnel Railway Company and from exercising the said franchise owned by your orators as aforesaid; and they threaten to, and unless enjoined they will in order to procure money for that purpose, issue negotiable bonds of the city of New York and sell the same to purchasers who act in good faith without notice of the infirmity in and illegality of said bonds. The said issue and sale of such bonds unless enjoined will create a claim on behalf of the holders thereof that the same are valid and enforceable obligations of said city; and may increase the burden of taxation upon your orators and other tax-payers in the city of New York; and may give rise and color to a claim, that your orators are estopped from disputing the validity of said bonds and from opposing the further construction by defendants of said underground railroad and tunnel

XX. Before the beginning of the construction of the said underground railroad and subway by said defendants McDonald and The Rapid Transit Subway Construction Company, your orators duly notified the defendants The City of New York, its officers, said rapid-transit commissioners, the defendant McDonald and the persons who afterwards organized said Rapid Transit Subway Construction Company, that your orators had and owned the exclusive right and franchise to construct and operate an underground railroad and tunnel on the route specified in the articles of association and said maps of the Central Tunnel Railway Company; and your orators duly and publically protested against the acts of said defendants hereinbefore described. More than thirty days before this bill in equity was filed, your orators duly served upon the
55 defendants The Mayor and Comptroller of the City of New York and duly filed in the office of the counsel to the corporation of the city of New York the claim set forth in this bill and a notice of the intention of your orator to commence this suit.

XXI. Your orators hereby offer to pay and tender to the defendant The City of New York the whole amount of money heretofore paid by said city to the defendants John B. McDonald and The Rapid Transit Subway Construction Company, and to each of them, for the construction of a railroad and tunnel upon the route specified in the articles of association and map of said Central Tunnel Railway Company; and your orators offer to complete the construction of said railroad in accordance with the plan and specifications prescribed by said rapid-transit commissioners; and to operate the same in accordance with the statutes of the State of New York; and your orators offer to pay the prevailing rate of wages to all workmen employed upon said construction and to use no stone in said construction that has been worked, carved or dressed outside of the State of New York and to have no workmen employed upon said construction work more than eight hours a day; and to obey all of

sections 3 and 4 of the labor law of the State of New York; and your orators offer to do anything further that equity requires in the premises.

Inasmuch, therefore, as your orators have no adequate remedy at the common law nor except in this honorable court, sitting in equity, and to the end, therefore that the defendants may, if they can show why your orators should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived; your
56 orators pray: (1) That your honors may grant writs of injunction both interlocutory until the entry of the final decree herein and also under such final decree perpetually restraining the said defendants and each of them, their officers, attorneys, agents, servants and workmen and the officers, attorneys, agents, servants and workmen of each of them from constructing and from operating and from continuing the construction of a tunnel, a subway, a railroad, and any one or more of said things, upon the route specified in the articles of association and map of the Central Tunnel Railway Company namely, from a point at or near the City Hall park in said city of New York, and running thence northerly to, and under Chambers street, and through the block to and under Reade street to Elm street, thence northerly through and under Elm street, to and under Spring street, and through the blocks to and under the cross-streets, to and under Great Jones street, thence cross-streets, to and under Great Jones street, thence northerly through and under Lafayette place, to and under Astor place and Eighth street, thence northerly and through the blocks to and under Ninth street to Fourth avenue, thence northerly through and under Fourth avenue to and under 42d street to or near the Grand Central depot, connecting with the Fourth Avenue improvement; and upon the route specified in the map and articles of association of the Rapid Transit Underground Railroad Company namely: From a point at or near the post-office building, City Hall park, in said city of New York, and running thence northerly under Park row and Centre street, and through the block to and under Reade street, to *new* Elm street thence northerly, through and under Elm street, and under the cross-streets, to, and under Spring street and Marion or Mulberry streets thence northerly through the blocks and under the cross-streets to, and under Great Jones street, thence northerly
57 through and under Lafayette place to, and under Astor place and Eighth street, thence northerly and through the blocks to, and under Ninth street to Fourth avenue, thence northerly through and under Fourth avenue and under the cross-streets to and under Forty-second street, to or near the Grand Central depot, thence westerly through and under Forty-second street, and the cross-streets to Broadway, thence northerly through and under Broadway, and under the cross-streets to, and under 59th street, thence northerly through and under the Boulevard and Eleven-h avenue, and under

the cross-streets to 124th street, thence northerly on over and along the line of Eleventh avenue, and over the cross-streets to 134th streets, thence through and under Eleventh avenue and under the cross-streets to, or near 155th street; and upon any part of said routes; and from interfering with the construction and operation of an underground railroad and tunnel by your orator upon said route;

(2.) That your honors may grant writs of injunction interlocutory and final perpetually enjoining and restraining the defendants The City of New York, The Mayor *and Comptroller of the City* of New York and said Rapid Transit Commissioners and each of them, their officers, attorneys, agents, servants and workmen and the officers, agents, attorneys, servants and workmen of each of them from paying any money under color of said rapid-transit act to the defendants McDonald and The Rapid Transit Subway Construction Company, and to either of them, and from paying any money to any one under color of said rapid-transit act, and from signing and from countersigning and from issuing and from authorizing the issue of any warrants upon the treasury of the city of New-York under color of said rapid-transit act; and from signing and from countersigning and from selling and from issuing any bonds and any stock of the city of New York under color of said rapid-transit act or to obtain money to aid in the construction of said railroad or tunnel.

58 (3.) That your honors may appoint forthwith a receiver to take possession, hold and preserve so much of the railroad tunnel and subway as is already constructed upon said route.

(4.) That your orators may have such other and further relief in the premises as may be just and meet, with the costs of this suit.

(5.) May it please your honors to grant unto your orators, not only writs of injunction and a receiver conformable to the terms of this bill, but also a writ of subpœna of the United States of America directed to the said Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, individually and as comptroller of the city of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jesup, individually and as members of the pretended board of rapid-transit commissioners of the city of New York, John B. MacDonald, the Rapid Transit Subway Construction Company, and the City of New York, commanding them and each of them on a day certain to appear and answer unto this bill of complaint and to abide and perform such order and decree as to this honorable court shall seem proper and required by the principles of equity and good conscience; and your orator will ever pray, &c.

JAMES M. FISK,
Attorney and Solicitor for Complainants,
99 Nassau Street, New York.

ROGER FOSTER, *Of Counsel.*

59 EXHIBIT A.

Article of Association of the Central Tunnel Railway Company.

Know all men by these presents: That we the undersigned, under and in pursuance of an act of the legislature of the State of New York, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April 2, 1850, and the acts amendatory thereof and supplementary thereto, and especially in pursuance of the act of the said legislature, entitled "An act to provide for excavating and tunneling, and bridging for transportation purposes, within villages and cities of this State," passed June 25, 1880, have associated ourselves together for the purpose of constructing and maintaining and operating a railroad for public use in the conveyance of persons and property, and for that purpose have made, signed, and executed these articles of association.

First. The corporate name of said company shall be "The Central Tunnel Railway Company."

Second. The company is to continue in existence for the period of ninety-nine years.

Third. The places from and to which said railroad is to be constructed, maintained and operated, are as follows: Commencing at or near City Hall park, in the city, county and State of New York, and terminating to or near the Grand Central depot at 42d street in said city, county and State.

Fourth. The length of said railroad, as nearly as may be estimated, is five miles, and the same is intended to be constructed from a point at or near the City Hall park in said city of New York, and running thence northerly, to and under Chambers street,
60 and through the block to and under Reade street to Elm street, thence northerly through and under Elm street to and under Spring street, thence northerly through the blocks and under the cross-streets to and under Great Jones street, thence northerly through and under Lafayette place to and under Astor place and Eighth street, thence northerly and through the blocks to and under Ninth street to Fourth avenue, thence northerly through and under Fourth avenue to and under 42d street to or near the Grand Central depot connecting with the Fourth Ave. improvement.

Fifth. The amount of capital stock of said railroad company shall be five millions of dollars, consisting of fifty thousand shares of one hundred dollars each.

Sixth. The names and places of residence of thirteen directors of said company, who shall manage its affairs for the first year, and until others are chosen in their places, are as follows, to wit:

John Cochrane, New York city; G. Tillotson, of New York city; S. D. Schuyler, New York city; C. B. Meserole, New Rochelle, N. Y.; Henry C. Stetson, of New York city; William Kent, New York city; H. F. Pultze, New York city; W. C. Nicoll, New York city; Wm. E. Worthen, New York city; Stephen O. Lockwood, New York city;

Ogden P. Pell, New York city; John Schuyler, Pelham, N. Y., Richard Ogden, New York city.

In witness whereof, we have hereunto respectfully subscribed our names and places of residence, and severally agree to take the number of shares of stock of said company, set opposite our respective names.

Names.	Residences.	No. of shares.
H. F. Pultze	New York city	2
James T. Waters	Nyack, N. Y.	2
John Schuyler	Pelham, N. Y.	2
John McCrackan	New York city	2
George W. Goodman	South Orange, N. J.	2
61 William Kent	New York city	2
Eugene Schieffelin	New York city	2
W. C. Nicoll	New York city	2
G. Tillotson	New York city	2
Rob't Jones	New York city	2
H. C. Stetson	New York city	2
S. D. Schuyler	New York city	2
George Lorillard	New York city	2
Abel Denison	Brooklyn, N. Y.	2
C. B. Meserole	New Rochelle, N. Y.	2
Ogden P. Pell	New York city	2
Stephen O. Lockwood	New York city	2
N. Denison Morgan	New York city	2
John Cochrane	New York city	2
Wm. E. Worthen	New York city	2
James B. Johnston	New York city	2
C. Merighi	New York city	2
Richard Ogden	New York city	2
Geo. F. Riley	New York city	2
George Godfrey, Jr.	New York city	2

STATE OF NEW YORK, }
City and County of New York, } ss.:

John Schuyler, Wm. Kent and Gouverneur Tillotson, being each for himself — depose and say: That he is a director of the Central Tunnel Railway Company; that he is named in the articles of association of said company as a director.

That the amount of stock required by the second section of an act of the legislature of the State of New York, entitled "An act to authorize the formations of railroad corporations, and to regulate the same," passed April 2, 1850, has been in good faith subscribed, and that ten per cent. thereon has been paid in good faith and in cash to the directors of said company, and that it is intended in good faith to construct, maintain and operate the road mentioned in said articles of association.

JOHN SCHUYLER.
WILLIAM KENT.
G. TILLOTSON.

62 Sworn to before me this 25th day of March, 1881.

WM. F. LEFT,

[SEAL.] *Notary Public, New York County.*

Articles of association of the Central Tunnel Railway Company, State of New York, office of the secretary of state. Filed and recorded March 26th, 1881. Anson Wood, deputy sec'y of state.

We, the undersigned, being a majority of the board of directors of the Central Tunnel Railway Company, do hereby certify, that the foregoing articles of association are the articles of association of said company as amended by the board of directors, thereof, at a meeting duly called and held on the 12th day of November, 1881, and that said amended articles are made to cure an informality which exists in the present articles now on file in the office of the secretary of state, at Albany, N. Y., said informality consisting of this, to wit: That the said original articles do not in the body thereof state the places of residence of the persons therein named as directors of said company, and are made and filed in said secretary of state's office to conform to the general act under which said corporation was organized, and under and in pursuance of the act of the legislature of the State of New York, being § 1 of chap. 135 of the Laws of 1870.

Witness our hands this twelfth day of November, 1881.

G. TILLOTSON.
STEPHEN O. LOCKWOOD.
WILLIAM KENT.
JOHN COCHRANE.
H. C. STETSON.
S. D. SCHUYLER.
W. C. NICOLL.

63 We hereby certify that at a meeting of the board of directors of the Central Tunnel Railway Company, held on the twelfth day of November, 1881, pursuant to due notice, a majority of said board being present, the following preamble and resolution *was* unanimously adopted, viz:

"Whereas, the articles of association of the Central Tunnel Railway Company filed in the office of the secretary of state, at Albany, on the twenty-sixth day of March, 1881, omit to state in the body thereof the places of residence of the persons therein named as directors of said company." And

"Whereas, such omission is a technical irregularity which may be cured by filing amended article- under the provisions of chap. 135 of the Laws of 1870." Now therefore,

"Resolved, That amended articles of association be made and filed in the office of said secretary of state, for the purpose of correcting such irregularity, and that the same be certified by the board of directors of said company."

JOHN COCHRANE, *President.*

WILLIAM KENT, *Secretary.*

EXHIBIT B.

Order Appointing Commissioners.

At a general term of the supreme court held in and for the first judicial department at the county court-house in the city of New York on the second day of February, 1883.

Present: The Hon. Noah Davis, presiding justice. The Hon. John R. Brady, The Hon. Charles Daniels, justices.

64 In the Matter of THE CENTRAL TUNNEL RAILWAY COMPANY.

On reading and filing the petition of the Central Tunnel Railway Company duly verified on the twenty-seventh day of June, 1882, and the affidavit of John Schuyler, chief engineer of said petitioner, verified on the twenty-sixth day of June, 1882, and of Solomon Cohen, verified on the fourth day of May, 1882, and of Henry C. Stetson verified on the sixth day of May, Benjamin Richards, Jr., verified on the 27th day of June, 1882, and upon the plans and routes of the petitioner heretofore filed in the office of the register of the city and county of New York and the assessment-rolls for the year 1881 of property on Fourth avenue between Forty-second street, and Eighth street, and on Lafayette place between Eighth street and Great Jones street, and on Elm street between Spring street and Chambers street, in the city of New York, on file in the tax office of said city. And it satisfactorily appearing to the court that the petitioner is a railroad company formed under chapter 140 of the Laws of 1850—known as the general railroad act, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," and all acts amendatory thereof, or supplementary thereto, and incorporated for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property in the city of New York, commencing at a point at or near the City Hall park in said city, and running thence northerly to and under Chambers street, and through the block to and under Reade street to Elm street, thence northerly through and under Elm street to and under Spring street, thence northerly through the blocks and under the cross-streets to and under Great Jones street, thence northerly through and under Lafayette place to and under
65 Astor place and Eighth street, thence northerly and through the blocks to and under Ninth street to Fourth avenue, thence northerly through and under Fourth avenue to and under Forty-second street, to or near the Grand Central depot connecting with the Fourth Avenue improvement, and that according to the route and plans adopted by the petitioner it is necessary to build said railroad underground and in a tunnel, and that it is the intention of the petitioner so to build such railroad under the provisions of chapter 582 of the Laws of 1880; and it further appearing to the court that the consent of the owners of one-half in value of the property bounded on the line of such road, cannot be obtained. Now,

therefore, on motion of Tillotson & Kent, attorneys for the said petitioner, it is ordered that William G. Choate, John T. Agnew and James McLean be and they are hereby appointed commissioners to determine, after a hearing of all parties interested, whether such a railroad ought to be allowed to be built underneath said streets, roads and public places, or any of them, and in what manner the same may be so built with the least damage to the surface, and to the use of the surface by the public, according to the provisions of and with all the powers conferred by the said chapter 582 of the Laws of 1880.

And it is further ordered that said commissioners report their determination to this court with all convenient speed.

And it is further ordered that the first meeting of said commissioners be held at the general-term room at the court-house in the city of New York on the 10th day of February, 1883, at one o'clock in the afternoon of that day, and that at such meeting said commissioners appoint a time when and place where they will meet for the hearing by them of all parties interested, and that they cause notice thereof to be given by publishing daily (Sundays excepted) in the newspapers published in the city of New York called The Daily Register, New York Times, Daily Tribune, The New York Herald, The New York World, The Morning Journal, Truth, The Sun, " The Evening Post, The Mail & Express for one week prior to the time of such last-mentioned meeting, a notice that such commissioners will meet at a time and place therein specified to hear all parties interested in the matter as to whether or not such railroad shall be so built, and also by causing a copy of such notice to be left at each building fronting upon the streets and avenues through and under which such railroad is proposed to be built with a person of suitable age, at least one week previous to such meeting, and by serving a copy thereof upon the mayor of the city of New York at least one week previous to such meeting.

Ent.

N. D., *P. J.*

Exhibit C.

Rapid Transit Subway Construction Company.

Certificate of Incorporation.

We the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and at least one of us a resident of the State of New York, desiring to form a stock corporation pursuant to the provisions of the business corporations law, do hereby

Certify as follows:

I. The name of the proposed corporation is Rapid Transit Subway Construction Company.

II. The purpose or purposes for which it is formed are to construct, or aid in the construction and equipment of rapid-transit

railroads in the city of New York, authorized by chapter four of the laws of eighteen hundred and ninety-one, and its amendments, the putting the same in operation, and the use, maintenance
67 and operation thereof; also for the purpose of manufacturing, purchasing, selling and dealing in all materials and supplies useful in connection with the construction or operation of such rapid-transit railroads; also to purchase, hold and deal in the stock and bonds of any other corporation or corporations organized to construct or operate said railroads.

III. The amount of capital stock of the said corporation is six million dollars ($6,000,000) all of which shall be common stock.

IV. The number of shares of which the capital stock shall consist is sixty thousand (60,000) and the par value of each share is one hundred dollars ($100). The amount of capital with which the corporation will begin business is one million dollars ($1,000,000).

V. The principal business office of the corporation is to be located in the city of New York, county of New York, and State of New York

VI. Its duration is perpetual.

VII. The number of its directors is to be thirteen.

VIII. The names and post-office address of the directors for the first year are:

Names.	Post-office address.
William H. Baldwin, Jr..	120 Willow street borough of Brooklyn, city of New York.
Charles T. Barney.....	101 East 38th street, New York.
August Belmont	190 Madison Ave., N. Y.
George Coppell.....	40 Fifth Ave.
E. Mora Davison.....	148 East 36th St.
Andrew Freedman.....	617 5th Ave., N. Y.
James Jourdan.....	180 Remsen street, borough of Brooklyn, New York.
Gardiner M. Lane.....	Cambridge, Mass.
Walter Oakman.....	12 East 53rd street, New York.
John Pierce.....	434 Fifth avenue, New York.
William A. Read.....	4 East 62nd street, New York.
Cornelius Vanderbilt.....	608 Fifth Ave.
George W. Young.....	28 West 73d St.

68 IX. The directors shall at their first meeting after organization divide themselves by lot or otherwise as they may agree, into three classes the term of office of the first class to continue one year, of the second class to continue two years and of the third class to continue three years; but such classification shall be so made that at least one-fourth of the whole number of directors shall be elected annually. The board of directors may make by-laws appropriate to carry out the provisions, which by-laws shall bind the members of the corporation.

X. No transfer shall relieve any original subscriber to the stock of the company from his obligation to take and pay for the number of shares subscribed for by him in accordance with the terms of his subscription.

XI. The names and post-office addresses of the subscribers and a statement of the number of shares of stock which each agrees to take in the corporation are as follows:

Names.	Post-office addresses.	No. of shares.
Charles T. Barney	101 East 38th St., New York	100
August Belmont	190 Madison Ave., N. Y.	100
John B. McDonald	1 West 72nd St., N. Y.	100
Walter T. Oakman	12 East 53rd St., N. Y.	100
William A. Read	4 East 62nd St., N. Y.	100

In witness whereof we have made, signed, acknowledged and filed this certificate in duplicate, dated this 16th day of February, nineteen hundred.

CHARLES T. BARNEY.
AUGUST BELMONT.
JOHN B. McDONALD.
WATER T. OAKMAN.
WM. A. READ.

STATE OF NEW YORK, }
County of New York, } ss.:

On the 16th day of February, 1900, before me personally
69 came Charles T. Barney and on the 17th day of February in the year last aforesaid also before me personally came August Belmont, John B. McDonald, Walter T. Oakman and William A. Read, each to me known and known to me to be one of the individuals described in and who executed the foregoing instrument and each of whom to me acknowledged that he executed the same.

A. W. ANDREWS (34),
[NOTARIAL SEAL.] *Notary Public, N. Y. C.*

(Attached.)

Duplicate.

Treasurer's Office, State of New York.

$7,500.00. ALBANY, *Feb.* 19, 1900.

Received from Rapid Transit Subway Construction Company seventy-five hundred dollars, in full of tax of one-eighth of one per centum upon the capital stock of $6,000,000 of the above-named company for the privilege of organization pursuant to chapter 908, Laws of 1896.

ANDREW DAVIDSON.
Deputy Treasurer.

WILLIS E. MERRIMAN,
Grand Dep'ty Comptroller.

(Endorsed:) U. S. circuit court. Filed Jul- 9, 1901. John A. Shields, clerk.

70 Circuit Court of the United States, Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jessup, Individually and as Members of the Pretended Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and The Rapid Transit Subway Construction Company, Defendants.

And now come the complainants The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company; and file and make the following amendment to their bill in equity heretofore filed herein on the 9th day of July, 1901; which amendment is to follow paragraph XXI in said bill and to precede the prayer for relief in said bill, which prayer for relief begins "Inasmuch, therefore, as your orators," &c.:

71 XXII. The said franchise which was acquired by the said Central Tunnel Railway Company and which is now owned by your orators is of the value of more than one million ($1,000,000) dollars. The profits of the said rapid-transit contract will exceed ten million ($10,000,000) dollars. The said franchise will be destroyed and made utterly valueless unless your orators obtain from this honorable court the writ of injunction hereinafter prayed for.

This suit arises under the Constitution and the laws of the United States and the matter in dispute herein exclusive of interest and costs exceeds the sum and value of two thousand ($2000) dollars.

JAMES M. FISK,
Solicitor for Complainants, 99 Nassau Street, New York.

ROGER FOSTER, *Of Counsel.*

(Endorsed:) U. S. circuit court—Filed Aug. 5, 1901—John A. Shields clerk.

72 United States Circuit Court, Southern District of New York.
In Equity.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jesup, Individually and as Members of the Pretended Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and Rapid Transit Subway Construction Company, Defendants.

The demurrer of The City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, individually and as comptroller of the city of New York, defendants in the action entitled as above, to the bill of complaint of the above-named complainants, as amended by the amendments filed on the — day of August, 1901.

73 These defendants by protestation, not confessing or acknowledging any or all of the matters or things in said bill (as so amended) contained to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill as so amended, and for cause of demurrer show:

First. That it appears on the face of the said bill that this court is without jurisdiction in the premises, in that the matter in dispute does not arise under the Constitution or laws of the United States.

Second. That it appears on the face of the said bill as so amended that all the parties to the suit are citizens of the State of New York, and that this suit does not involve any question arising under the Constitution or laws of the United States, and therefore this court has no jurisdiction in the premises.

Third. That the complainants have not in and by their said bill as so amended made or stated such a case as entitled them in a court of equity to any relief against these defendants as to the matters contained in said bill or any of such matters, and that said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainants any relief against these defendants.

Fourth. That the said bill as so amended is exhibited against these defendants and against several other defendants to the said bill for several distinct and independent matters and causes which have no relation to each other, and that said bill is altogether multifarious.

Fifth. That it appears in and by said bill as so amended that the alleged causes of action therein set forth are stale, and that so long a time has elapsed since the happening of the matters and things

therein alleged that it would be contrary to equity or good conscience to take cognizance thereof or to assume to enforce the same.

Sixth. That no case is stated in said bill as so amended authorizing the relief sought or any other relief.

Wherefore and for other divers good causes of demurrer appearing in said bill as so amended these defendants do demur thereto,
74 and humbly demand judgment of this court whether they shall be compelled to make any further or other answer to said bill, and pray to be hence dismissed, with their costs and charges in this behalf most wrongfully sustained.

New York, August 30, 1901.

THE CITY OF NEW YORK.
ROBERT A. VAN WYCK,
Individually and as Mayor of the City of New York.
BIRD S. COLER,
Individually and as Comptroller of the City of New York,
By JOHN WHALEN,
Corporation Counsel, Solicitor, 2 Tryon Row, New York City, N. Y.

I, the undersigned, counsel for the City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York, and Bird S. Coler, individually and as comptroller of the city of New York, defendants in the above-entitled case do hereby certify that the foregoing demurrer is, in my opinion well founded in point of law.

JOHN WHALEN.

SOUTHERN DISTRICT OF NEW YORK, } ss:
County of New York, }

Bird S. Coler, being duly sworn, deposes and says, that he is one of the defendants for whom this demurrer is interposed; that the demurrer of these defendants to the bill of complaint in the above-entitled case is not interposed for delay.

BIRD S. COLER.

Sworn to and subscribed before me this 30th day of August, 1901.

R. E. SELMES,
Notary Public, Kings Co.

Certificate filed — N. Y. Co.

(Endorsed:) U. S. circuit court Filed Aug. 30, 1901 John A. Shields, clerk.

75 United States Circuit Court for the Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

vs.

ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Alexander E. Orr (Sued as Albert E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (Sued as Charles L. Smith), Morris K. Jesup, Individually and as Members of the Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, The Rapid Transit Subway Construction Company, and The City of New York, Defendants.

The demurrer of the defendants, Alexander E. Orr, sued as Albert E. Orr; John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith, sued as Charles L. Smith, and Morris K. Jesup, individually and as members of the board of rapid-transit railroad commissioners for the city of New York, to the bill of complaint of the above-named complainants, as amended by the amendments filed on the 5th day of August, 1901.

76 These defendants by protestation, not confessing or acknowledging any or all of the matters or things in said bill (as so amended) contained to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill as so amended, and for cause of demurrer show:

First. That it appears on the face of the said bill that this court is without jurisdiction in the premises, in that the matter in dispute does not arise under the Constitution or laws of the United States.

Second. That it appears on the face of the said bill that all the parties to the suit are citizens of the State of New York, and that this suit does not involve any question arising under the Constitution or laws of the United States, and therefore this court has no jurisdiction in the premises.

Third. That the complainants have not in and by their said bill made or stated such a case as entitled them in a court of equity to any relief against these defendants, as to the matters contained in said bill or any of such matters, and that said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainants any relief against these defendants.

Fourth. That the said bill is exhibited against these defendants and against several other defendants to the said bill for several distinct and independent matters and causes which have no relation to each other, and that said bill is altogether multifarious.

Fifth. That it appears in and by the said bill that the alleged causes of action therein set forth are stale, and that so long a time has elapsed since the happening of the matters and things therein

alleged that it would be contrary to equity or good conscience to take cognizance thereof or to assume to enforce the same.

Sixth. That no case is stated in said bill authorizing the relief sought or any other relief.

Wherefore, and for other divers good causes of demurrer appearing in said bill, these defendants do demur thereto, and humbly demand judgment of this court, whether they shall be com-
77 *pelled to make any further or other* answer to said bill, and pray to be hence dismissed, with their costs and charges in this behalf most wrongfully sustained.

New York, August 28th, 1901.

PARSONS, SHEPARD & OGDEN,
Solicitors for Defendants Alexander E. Orr and Others,
111 *Broadway, Borough of Manhattan,*
City of New York.

BOARDMAN, PLATT & SOLEY,
Solicitors for Defendants Alexander E. Orr and Others,
35 *Wall Street, Borough of Manhattan,*
City of New York.

SOUTHERN DISTRICT OF NEW YORK, } ss:
County of New York, }

Alexander E. Orr, being duly sworn, deposes and says that he is one of the above-named defendants; that the foregoing demurrer of the said defendants to the bill of complaint as amended in the above-entitled case, is not interposed for delay.

A. E. ORR.

Sworn to and subscribed before me, this 28th day *day* of August, 1901.

ROB'T H. HUTCHINS,
[NOTARIAL SEAL.] *Notary Public, N. Y. Co.*

I, the undersigned, counsel for the defendants, Alexander E. Orr, sued as Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith, sued as Charles L. Smith and Morris K. Jesup, individually and as members of the board of rapid-transit railroad commissioners for the city of New York, in the above-entitled case, do hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

EDWARD M. SHEPARD.

(Endorsed:) U.S. circuit court, Filed Sep. 2, 1901—John A. Shields clerk.

78 United States Circuit Court, Southern District of New York
In Equity.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

vs.

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jesup, Individually and as Members of the Pretended Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and Rapid Transit Subway Construction Company, Defendants.

The demurrer of John B. McDonald, one of the above-named defendants, to the bill of complaint of the above-named complainants, as amended by the amendments filed on the fifth day of August, 1901.

This defendant by protestation, not confessing or acknowledging any or all of the matters or things in said bill (as so amended) contained to be true in such manner and form as the same are
79 therein set forth and alleged, doth demur to said bill as so amended, and for cause of demurrer showeth:

First. That it appears on the face of the said bill that this court is without jurisdiction in the premises, in that the matter in dispute does not arise under the Constitution or laws of the United States.

Second. That it appears on the face of the said bill as so amended that all the parties to the suit are citizens of the State of New York, and that this suit does not involve any question arising under the Constitution or laws of the United States, and therefore this court has no jurisdiction in the premises.

Third. That the complainants have not in and by their said bill as so amended made or stated such a case as entitles them in a court of equity to any relief against this defendant as to the matters contained in said bill or any of such matters, and that said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainants any relief against this defendant.

Fourth. That the said bill as so amended is exhibited against this defendant and against several other defendants to the said bill for several distinct and independent matters and causes which have no relation to each other, and that said bill is altogether multifarious.

Fifth. That it appears in and by the said bill as so amended that the alleged causes of action therein set forth are stale, and that so long a time has elapsed since the happening of the matters and things therein alleged that it would be contrary to equity or good conscience to take cognizance thereof or to assume to enforce the same.

Sixth. That no case is stated in said bill as so amended authorizing the relief sought or any other relief.

80 Wherefore, and for other divers good causes of demurrer appearing in said bill as so amended, this defendant doth demur thereto, and humbly demands judgment of this court whether it shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed, with its costs and charges in this behalf most wrongfully sustained.

New York, August 1, 1901.

JOHN B. McDONALD,
By NICOLL, ANABLE & LINDSAY,
Solicitors, 31 *Nassau Street, New York.*

I, the undersigned, counsel for John B. McDonald, one of the defendants in the above-entitled case, do hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

DE LANCEY NICOLL.

SOUTHERN DISTRICT OF NEW YORK, } ss:
County of Westchester, }

John B. McDonald, being duly sworn, deposes and says; that he is one of the above-named defendants; that the foregoing demurrer of the said defendant to the bill of complaint in the above-entitled case is not interposed for delay.

JOHN B. McDONALD.

Sworn to and subscribed before me this 31st day of August, 1901.

BERNHARD BARUCH,
[SEAL.] *Notary Public, Westchester County.*

81 STATE OF NEW YORK, } ss:
County of Westchester, }

I, Leverett F. Crumb, clerk of the county of Westchester, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify that Bernhard Baruch before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of Westchester county, dwelling in said county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 31st day of August, 1901.

[SEAL.] LEVERETT F. CRUMB, *Clerk.*

(Endorsed:) U. S. circuit court Filed Sep. 2, 1902 John A. Shields clerk.

82 United States Circuit Court, Southern District of New York.
In Equity.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

vs.

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jesup, Individually and as Members of the Pretended Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and Rapid Transit Subway Construction Company, Defendants.

The demurrer of Rapid Transit Subway Construction Company, one of the above-named defendants, to the bill of complaint of the above-named complainants, as amended by the amendments filed on the 5th day of August, 1901.

83 This defendant by protestation, not confessing or acknowledging any or all of the matters or things in said bill (as so amended) contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill as so amended, and for cause of demurrer showeth:

First. That it appears on the face of the said bill that this court is without jurisdiction in the premises, in that the matter in dispute does not arise under the Constitution or laws of the United States.

Second. That it appears on the face of the said bill as so amended that all the parties to the suit are citizens of the State of New York, and that this suit does not involve any question arising under the Constitution or laws of the United States, and therefore this court has no jurisdiction in the premises.

Third. That the complainants have not in and by their said bill as so amended made or stated such a case as entitled them in a court of equity to any relief against this defendant as to the matters contained in said bill or any of such matters, and that said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainants any relief against this defendant.

Fourth. That the said bill as so amended is exhibited against this defendant and against several other defendants to the said bill for several distinct and independent matters and causes which have no relation to each other, and that said bill is altogether multifarious.

Fifth. That it appears in and by the said bill as so amended that the alleged causes of action therein set forth are stale, and that so long a time has elapsed since the happening of the matters and things therein alleged that it would be contrary to equity or good conscience to take cognizance thereof or to assume to enforce the same.

84 Sixth. That no case is stated in said bill as so amended authorizing the relief sought or any other relief.

Wherefore, and for other divers good causes of demurrer appearing in said bill as so amended this defendant doth demur thereto, and humbly demands judgment of this court whether it shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed, with its costs and charges in this behalf most wrongfully sustained.

New York, August 30th, 1901.

RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
By STRONG & CADWALADER,
Solicitors, 40 Wall Street, New York.

I, the undersigned, counsel for The Rapid Transit Subway Construction Company, one of the defendants in the above-entitled case, do hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

GEO. W. WICKERSHAM.

SOUTHERN DISTRICT OF NEW YORK, } ss.:
County of New York, }

Frederick Evans, being duly sworn, deposes and says that he is the secretary of The Rapid Transit Subway Construction Company, the above-named defendant; that the foregoing demurrer of the said defendant to the bill of complaint in the above-entitled case, is not interposed for delay.

FREDERICK EVANS.

Sworn to and subscribed before me, this 30th day of August, 1901.

EDWARD DONAHOE,
[SEAL.] *Notary Public, N. Y. County.*

(Endorsed:) U. S. circuit court. Filed Aug. 30, 1902. John A. Shields, clerk.

85 Circuit Court of the United States for the Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF New York and The Rapid Transit Underground Railroad Company, Complainants,
against
THE CITY OF NEW YORK, ROBERT A. VAN Wyck, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, and Morris K. Jessup, Individually and as Members of the Pretended Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and The Rapid Transit Subway Construction Company, Defendants.

In Equity. Nos. 89 and 90.

James M. Fisk, for complainants.
Roger Foster, of counsel.
Strong & Cadwalader, for Rapid Transit Subway Construction Company.
George W. Wickersham, Esq., for defendants.
Nicoll, Anable & Lindsay, for John B. McDonald.
Boardman, Platt & Soley.
Parsons, Shepard & Ogden, for defendants, Alexander E. Orr *et al.*
Edward M. Shepard, of counsel.

HAZEL, *D. J.:*

By this suit the complainants, domestic corporations organized under the laws of the State of New York, seek relief from alleged unauthorized acts of the defendants, The City of New York, certain municipal officers, rapid transit commissioners and contractors engaged in the construction of an underground railway, and subway in the city of New York. For the purpose of convenience and brevity, the defendants are hereafter designated as municipal
86 authorities, commissioners and contractors. The bill in form seeks to enjoin municipal officers and commissioners from issuing bonds of the city of New York to pay for the work done in the construction of the subway or underground railway now in course of completion, from paying any money to the contractors under color of authority of the rapid-transit act, so called, chapter 4, Laws 1891, as subsequently amended, and to restrain the contractors from continuing the construction of the road upon the route specified on maps filed by complainants and their predecessors. The defendants demur separately to the bill of complaint on the ground, first, that the subject-matter in dispute does not arise under the Constitution and laws of the United States, and, therefore, the court is without jurisdiction; second, that the court is also without jurisdiction because of the citizenship of the parties; third, want of equity ap-

pearing on the face of the bill; fourth, multifariousness and laches. The demurrants admit the following facts, to wit: The Central Tunnel Railway Company was organized on March 26, 1881, under the general railroad law of the State of New York (L. 1850, chap. 140; L. 1880, chap. 520), for the purpose of constructing and maintaining a railroad for the use of the public in the conveyance of persons in the city of New York. The articles of association specifically state the length of the railroad and the streets to and under which it was intended to construct said road. On March 28, 1882, a map and profile of the route adopted was filed as required by law. This company failed to obtain the consent of the municipal authorities and of the necessary property-owners, and, therefore,
87 on February 2, 1883, an application was made in its behalf to the general term of the supreme court for the first department, for the appointment of commissioners, pursuant to the tunnel law of 1880, chapter 582, to determine whether and in what manner such railroad ought to be built. Commissioners were appointed. Two vacancies in the commission occurred by resignation and declination to act. Other commissioners were appointed, one of whom also declined. Another application was made to the court to fill such vacancy, which application, however, was never granted. It does not appear when the last application was made but it may be assumed from the general allegations of the bill that it was very soon after the appointment of the commissioners following the first application, Neither the general term nor its successor, the appellate division of the supreme court, first department, has ever acted upon the latter application. No renewal of such application has been made to the appellate division, and nothing further was done by this corporation or its successors towards the appointment of commissioners. The New York and New Jersey Tunnel Railway Company and the Terminal Underground Railway Company were organized on January 2, 1883, and March 25, 1886, respectively, under the general railroad law of 1850, as amended by chapter 582 of the Laws of 1880. Subsequently on August 21, 1896, these three railroad companies were merged and consolidated into The Underground Railroad of the City of New York, one of complainants, which was organized and incorporated on October 2, 1896. The latter corporation paid a per-
88 centage tax of $181.00 on its capital stock, as required by law upon filing its certificate of incorporation. A map and profile of its route were duly filed June 10, 1897, and it is claimed that it succeeded to all the rights and privileges of its predecessors. The complainant, Rapid Transit Underground Railroad Company was incorporated on April 9, 1897, pursuant to chapter 39 of the General Laws, to construct an underground railway in the city of New York. On October 11, 1897, it filed a map and profile of the route over and under which it was intended to operate. On April 29, 1897, this corporation, which is a tax-payer, entered into an agreement with the underground railroad by which it obtained a leasehold right to the rights and franchises of the underground railroad. The bill avers broadly that by these proceedings, the Rapid Transit Underground railway acquired the exclusive

franchises to build and operate a railroad and tunnel over the route described by the map and profiles theretofore filed. By an act of the legislature, passed in 1891, amended by chapter 752, Laws of 1894, and already mentioned as the rapid-transit act, it is provided that a board of rapid-transit railroad commissioners shall be created, who among other things are empowered to fill vacancies among their number and to construct an underground railroad in the city of New York, provided the qualified electors of that city shall favor such construction. The act further empowers the commissioners to determine the route and general plan of construction, and provides that their plans and conclusions shall be submitted to the common council for its consent and approval; that in case consents of the property-owners along the line of
89 route upon which the approval of the municipal authorities had been given, cannot be obtained, an application shall be made by the commissioners to the appellate division of the supreme court for authority to construct along the proposed route. Such an application was made and authority obtained. Subsequently on February 24, 1900, the defendants The City of New York, municipal authorities and commissioners, entered into a contract with the defendants, contractors, to construct a road over the route described by the maps and profiles theretofore filed by the complainants and their predecessors. The bill which is very lengthy then proceeds to recite in detail the proceedings by which defendants claim to obtain the right to construct an underground railroad in the city of New York pursuant to the authority of the rapid-transit act. It is averred that the rapid-transit act is an infringement of the fourteenth amendment to the Constitution of the United States because it takes the property of the complainants for private use without due process of law, and is, therefore, unconstitutional. It is also averred in the bill that the determination of the commissioners appointed under the rapid-transit act to construct an underground railroad upon the routes over which it is claimed complainants have the right to construct a road, together with the consent of the local authorities and the action of the appellate division of the supreme court, in lieu of the consent of property-owners bounded upon such route, in effect gave consent to complainants to construct such road, and the legal effect of such acts must be construed
90 as a confirmation of complainant's franchise rights and inure wholly to their benefit.

Does the bill disclose from the foregoing statement of facts a cause of action which is cognizable by this tribunal? All parties are residents of the State of New York. To give the court jurisdiction there must, therefore, be involved a Federal question besides the necessary jurisdictional amount. How does the Federal question arise? Have the complainants by virtue of the various acts of incorporation set forth in the bill together with the steps which have been taken by their predecessors, as well as themselves, acquired any rights as against the defendants which bring them within the protection of the Federal Constitution or other national enactments? How could such privileges and immunities accrue to

the complainants as would entitle them here to equitable relief? Clearly, the complainants must be vested with some contract rights which have been impaired by legislative action on the part of the State of New York, thus bringing them within the protection of article 10, section 1, of the Federal Constitution, or they must have been deprived by the State of New York of some property right without due process of law, or be denied equal protection of the laws, and, therefore, may invoke the fourteenth amendment of the Constitution to their assistance. As was said in New Orleans *v.* N. O. Water Works Co. 142 U. S. 88,

"Before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired; and that to constitute a violation
91 of the provision against depriving any person of his property without due process of law, it should appear that such person has a property in the particular thing of which he is alleged to have been deprived."

The complainants cannot by mere allegation that such questions are before the court for decision vest the court with jurisdiction over a controversy when it clearly appears that no Federal question is involved. McCain *v.* Des Moines, 174 U. S. 168. Complainants claim that by statutory enactment they obtained an exclusive franchise to construct an underground railroad and that fixed and positive contractual relations were established which have been impaired by subsequent legislative and corporate action; that there is danger that complainants will be deprived of vested property rights without due process of law. When a question arising under the Constitution or laws of the United States is necessarily involved, the jurisdiction of the Federal courts may be properly invoked to redress the wrong and afford such reparable aid as equity and good conscience require. The averments of the bill are framed to that end. No citation of authorities is needed declarative of the principle that a franchise right obtained from a sovereign power for the purpose of constructing a railroad or to acquire lands for use by a corporation for the purpose for which it is created is property or its equivalent, a grant of privileges or immunities. Such property rights when obtained may be exercised undisturbed or may be converted into tangible benefits at the option of the owner. The object and purpose attained by the formation of an association often leads to liberal concessions by the sovereignty from motives of
92 public policy. It is presumed that the general public will receive substantial benefits by the State's munificence. From the very nature of the contemplated project the public is expected to receive the benefit either in health, convenience or welfare and the gratuitous generosity of the sovereign power is invoked to encourage the exploitation of vast commercial enterprises for the general good. It must follow that any legislative grant or procurement within the scope and power of the legislative authority when consummated becomes authoratatively a vested property right. The State after the contract is completed may do no act in restraint or

impairment of the contract rights and immunities which it gave. To restrict, vary or violate any such contractual rights and obligations which may have arisen is forbidden, as we have already seen, by section 10, subdivision 1, of the Constitution of the United States, which prohibits the enactment of any law by a State impairing the obligations of contracts. Adirondack R'y *v.* N. Y. State, 176 U. S. 335. The fourteenth amendment forbids a State to deprive any person of life, liberty or property without due process of law. Are any property rights shown by the bill to have been improperly divested from complainant without respect to this constitutional provision? It must be ascertained at the outset whether the complainants obtained any vested property rights pursuant to a legal contract with the State. If contractual obligations became vested by the completed acts of the parties, their subsequent impairment by the respondent may be shown as a basis for claiming jurisdiction in the Federal courts. Cooley Cons. Limitations, p. 54.

93 It is contended for the demurrants that the allegations of the bill clearly show that the complainants had no contract with the State whatever which has been or could be impaired by the acts complained of. I have carefully examined the authorities upon which complainants rely to establish the existence of such contractual relations between it and the State and as a result thereof, I am of opinion that the demurrant's contention must prevail. It is based on sound logic, good sense and substantive law. The incorporation of the Central Tunnel Railway Company, a predecessor of complainant, under General Laws of 1850, was authorized by the constitution of the State of New York, which vested the State legislature with power to pass general laws for the formation of corporations to construct street railroads. The provision of the constitution authorizes the legislature to enact general laws for the formation of corporations to lay down railroad tracks upon the condition, among others, that the consent of the local authorities be first obtained. In the case of People *v.* O'Brien, 111 N. Y., p. 30, Chief Justice Ruger says,

"This right under the constitution, could be acquired only from the city authorities, and they could grant or refuse it at their pleasure. The constitution not only made the consent of the municipal authorities indispensable to the creation of such a right, but, by implication, conferred authority upon them to grant the consent, upon such terms and conditions as they chose to impose, and upon the corporation the right to acquire it by purchase."

94 The constitution of the State further provided that when the required consents of property-owners cannot be obtained, the general term of the supreme court might upon application appoint three commissioners who shall determine after hearing of all parties interested whether such road ought to be constructed. This right under the constitution, therefore, could only be acquired by strictly complying with the provisions referred to. No greater right was imparted to the corporation by its articles of association, and subsequent filing of maps and profiles than the permissive right to obtain consents of property-owners and of the municipality affected. To affect a substantive contract between the State and a

corporation organized for the purpose of constructing a railroad requires a meeting of minds of the interested and essential parties of the contract. The constitution and the statutes of the State in unequivocal language have indicated who must be regarded as interested in such contractual obligations. The mere act of filing maps and profiles creates no lien in favor of a street surface railway as against the owner of adjacent property,—at least not until the legal authorities whose consent is essential have signified their complete acquiescence and assent to the construction of the railroad. Filing of maps is simply notice of intention as to the route and property which the road proposes to take. People *v.* Adirondack R'y, 160 N. Y. 225. In the case at bar, the attempt to obtain the consents of owners of property along the proposed route, as well as the assent of the municipal authorities was ineffectual. This, I think, must be regarded as equivalent to a refusal by the authorities to bargain or to assent to the immunities and property rights which
95 otherwise would have been acquired. The consent of the municipal authorities and the approval by the appellate division of the determination of the commissioners to construct a road pursuant to the rapid-transit act, cannot inure to the benefit of complainants. It was decided by the general term of the supreme court, first department, in the matter of N. Y. District Railway Company, 42 Hun. 621, that section 1, chapter 582, Laws 1880, amendment to the Laws of 1850, which provided that the determination of commissioners confirmed by the court may be taken in lieu of the consent both of municipal authorities and property-owners, is unconstitutional; that the consent of the municipality must be obtained in any event. This case was affirmed by the State court of appeals, 107 N. Y. 42. This decision leads to the conclusion that because of it and for no other reason, the general term failed to act upon the application of complainants' predecessor that the vacancy upon the commission theretofore appointed, be filled by the court. The complainants cannot, therefore, claim that any rights remain to them because of delay caused by inaction of judicial authority. Neither the complainants nor their predecessors had obtained either the consent of the municipal authorities or of property-owners abutting upon the line of route. The consents required by the constitution and laws of the State are conditions precedent to a valid contract and no right of franchise or immunities may be granted or obtained until such conditions are complied with. Filing of plans and profiles by any of the complainants or their predecessors resulted in the acquisition of no vested rights that could be
96 impaired by the acts admitted by the demurrers. Complainants had merely taken preliminary steps in the effort to obtain such vested rights. Matter of application of R. E. R. Co. 123 N. Y. 351; *In re* Thirty-fourth St. R. R. Co. 343. The language of Justice Gray in the opinion of the court rendered in the case first cited, may with propriety be applied. He says,

"Sufficient vitality and strength to go on with and to construct a railroad do not exist in the newly formed corporation, until infused by the consents of the local authorities and property-owners. Until

that moment, when the company can assert that the statutory conditions of its right to be and to do are fulfilled, it cannot strictly, nor justly, be said that it is in a position legally to deprive the landowner of his property. By organization under the act it has become a corporation, but with no authority as yet to construct and operate a railroad upon a street or highway. Its right to the exercise of that franchise is still inchoate and does not become a vested right, until after the consents specified by the statute have been obtained. It may be a corporation, but it has no power to take a step in the direction of occupying the street or highway, because it is, in effect, inhibited by the condition of its charter from doing so, while the consents to the appropriation of the street or highway to railroad uses are lacking."

In the latter case the right of the railroad company was subject to three precedent conditions. First, the consent of the local authorities; second, consent of property-owners or in lieu thereof
97 the determination and approval of the commissioners in its favor; third, the consent of the companies having coincident routes. The court held that these conditions must be performed before any right to proceed with the construction of the road could be exercised. It is, therefore, clear that the municipal authorities have the determining power to grant the right to tear up the streets and to take the property of the city for the construction of a street railroad. The choice of responsible parties is with the municipality. Obviously in no sense can the consents of municipal authorities obtained under the rapid-transit act of 1891, and amendments of 1894, inure to complainants' benefit. The authorities cited by counsel for complainants do not apply. They refer for most part to railroads constructed without the limits of a municipality, and where the preliminary steps to secure vested rights differ from those required in a case like the present. He asserts with great zeal and earnestness that complainants and their predecessors in good faith filed maps and profiles, necessarily expended $100,000.00 towards the construction of the road, and applied to the general term for the appointment of commissioners, and having begun construction of the road thereby upon the subsequent consent of the municipal authorities under the rapid-transit act acquired vested property rights; that in legal effect such action was a consummation of complainants' contract. I am unable to subscribe to that theory. It is a fallacious assertion in the light of the statutes of the State and of the authorities construing them. The determination of the commissioners appointed under the rapid-transit act, and
98 the rights acquired by individuals thereunder, can in no manner be viewed as an act in completion of what complainants' predecessors undertook to accomplish twenty years prior to that determination and failed. The application to the general term for the appointment of commissioners on February 2, 1883, was without force. It was prematurely made. None of the conditions, as we have seen, upon which the right to apply was based had been performed. The consent of the local authorities which was an essential element, could not be shown upon the application. People

ex rel. N. Y. U. R'y Co. *v.* Newton, 58 Super. Ct. 439; Matter of Petition of Long Island Railroad Co. 45 N. Y. 364; Schaper *v.* B. & L. S. C. R'y Co. 4 State Rep. 860; Matter of Application of Rochester Electric R'y Co. 123 N. Y. 351; Suburban Rapid Transit Co. *v.* The Mayor, 128 N. Y. 510. Moreover the rights of complainants' predecessors obtained by their charters lapsed and were abrogated by their failure to comply with the provisions of section 47 of the act of 1850, as amended by chap. 775 of the Laws of 1867. Such failure has uniformly been held to operate as a self-executory forfeiture of the charter of a corporation. *In re* B. W. & N. Rd. Co. 72 N. Y. 245; Brooklyn Steam Transit Co. *v.* City of Brooklyn, 78 N. Y. 524. These cases seem to be authoritative of the abandonment of the project by the companies which had obtained the permissive right to construct an underground railroad. No contract with the State has been established which is threatened with impairment. Never having had a franchise, — never having availed themselves of any permissive rights flowing from their incorporation,
99 they cannot now be heard to complain. The permissive right of complainant, Rapid Transit Underground Railway Company, which as already stated was incorporated April 9, 1897, to construct an underground road in the city of New York has not expired. The acts of defendants, commissioners under the rapid-transit act, cannot be construed to confer upon complainant any right or authority to construct an underground railroad specifically mentioned in the act. By the provisions of the rapid-transit act, the privilege and franchise is to be sold at public auction to a corporation organized and existing under that act. The averred unconstitutionality of the rapid-transit act and the invalidity of the contract entered into by the defendants for the many reasons assigned in the bill seems to be sufficiently answered by the decision of the court of appeals of the State of New York in The Sun Publishing Co., *v.* Mayor, &c., 152 N. Y., 257. The constitutionality of the rapid-transit act is there established. The decision being that of the highest tribunal of the State is controlling upon this court. Adams Express Co. *v.* Ohio, 165 U. S. 219. It falls within the general rule that the construction of the State courts of last resort, of State constitutions, and statutes, will ordinarily be accepted by the courts of the United States as controlling. Innumerable reasons are assigned by the bill to show that the municipality and the commissioners improperly contracted for the construction of the road. Their good faith is attacked. None of these reasons, however, justify Federal interference by virtue of the fourteenth amendment to
100 the Constitution. French *v.* Barber Asphalt Co. 101 U. S. 324. A tax of one-eighth per cent. upon the amount of capital required upon organization (L. 1886, chap. 143, as amended by L. 1892, chap. 668), can have no bearing upon the question at issue. That was a tax for the privilege of organizing a corporation for purposes specified in its charter. Payment of the tax can be given no other effect.

A further point is made by complainants that the unconstitutionality of the rapid-transit act is attested by reason of provisions which

are claimed to be a denial to the complainant of the equal protection of the laws. (U. S. Cons. 14th amendment.) The rapid-transit act does not arbitrarily authorize the commissioners to contract with the contractors to the exclusion of others. As before stated the act in terms authorizes the rapid-transit board to contract

"With any person, firm or corporation which in the opinion of the board shall be best qualified to fulfil and carry out such contract, for the construction of such road or roads upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions not inconsistent with the aforesaid plans and specifications as said board shall determine to be best for the public interest." (Sec. 34.)

No particular person, class of persons or corporation, is excluded from the privilege of contracting for the construction and
101 operation of the proposed railroad. All may compete. Therefore, the State has not denied to complainant the equal protection of the laws under the fourteenth amendment. Pacific Rd. Removal Cases, 115 U. S. 321; Tinsley *v.* Anderson, 171 U. S. 101. Other more extended discussion of questions presented would serve no beneficial purpose. In the view taken no Federal question is involved which entitles the complainants to redress in the courts of the United States. The demurrers of the defendants on the ground of want of jurisdiction are sustained. The complaint is dismissed with costs.

(Endorsed:) Circuit court of the United States for the southern district of New York, in equity, Nos. 89 and 90.—The Underground Railroad of the City of New York & *1*, complainants, *vs.* The City of New York, *et al.* defendants.—Opinion.—Hazel, D. J.—U. S. circuit court, southern district of New York, Filed Jun- 19, 1902, John A. Shields, clerk.

102 At a term of the circuit court of the United States for the southern district of New York, held at the court-rooms of said court in the United States court-house and post-office building in the county of New York, on the 18th day of August, 1902.

Present: Hon. John R. Hazel, district judge.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW York and The Rapid Transit Underground Railroad Company, Complainants,
against
THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Alexander E. Orr (Sued as Albert E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (Sued as Charles L. Smith), Morris K. Jesup, Individually and as Members of the Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and Rapid Transit Subway Construction Company, Defendants. } In Equity.

This cause came on to be heard at this term and was argued by counsel and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the demurrers of the defendants separately interposed to the bill of complaint as amended, be, and they are, and each of them hereby is, sustained, and that said bill of complaint as amended be, and the same hereby is,
103 dismissed for want of jurisdiction upon the ground that this court has no jurisdiction of the same.

[SEAL.] JOHN R. HAZEL, *U. S. J.*

(Endorsed:) Circuit court of the U. S., southern dist. of New York. The Underground Railroad of the City of New York and ano., against The City of New York, *et al.* In equity.—Decree.—Parsons, Shepard & Ogden, solicitors for Board of Rapid Transit Railroad Commissioners, 111 Broadway, N. Y. city.—James M. Fish, sol'r for complainants.—U. S. circuit court, southern district of New York. Filed Aug. 19, 1902, John A. Shields, clerk.

104 Circuit Court of the United States for the Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,
against
THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; *Bird* S. Coler, Individually and as Controller of the City of New York; Alexander E. Orr (Sued as Albert E. Orr), John H. Starin, Woodbury Langdom, George L. Rives, Charles S. Smith (Sued as Charles L. Smith), Morris K. Jesup, Individually and as Members of the Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and Rapid Transit Subway Construction Company, Defendants. } In Equity.

The circuit court of the United States for the southern district of New York hereby certifies to the Supreme Court of the United States that on the 19th day of August, 1902, a decree was entered in the above-entitled suit in equity pursuant to the decision of the said court sustaining the demurrers of the defendants separately interposed to the bill of complaint as amended and dismissing said bill of complaint as amended for want of jurisdiction of the same; a copy of which amended bill *and* equity and demurrers is contained in the record of this suit, to which reference is had for a more particular description thereof.

And this court further certifies that in said suit the juris-
105 diction of this court is in issue; and further certifies to the Supreme Court of the United States said question of jurisdiction raised by said demurrers to said amended bill in equity as follows:

(1.) When a circuit court of the United States decides that the complainant to a bill of equity brought to enforce an alleged right which he claims arises under the Constitution of the United States shows no right arising under the Constitution of the United States, has said court jurisdiction to decide and hear and determine other matters of equitable cognizance pleaded in said bill, which do not arise under either the Constitution of the United States or a statute, or a treaty thereof; if the complainant and defendant are citizens of the same State?

(2.) Has this court jurisdiction of the said amended bill in equity?

Dated New York, September 12th, 1902.

JOHN R. HAZEL,
United States Judge.

[SEAL OF U. S. C. C., S. D. N. Y.]

106 Circuit Court of the United States, Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Controller of the City of New York; Alexander E. Orr (Sued as Albert E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (Sued as Charles L. Smith), Morris K. Jesup, Individually and as Members of the Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and The Rapid Transit Subway Construction Company, Defendants.

The above-named complainants The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, conceiving themselves aggrieved by the decree entered August 19th 1902, in the above-entitled proceedings, do hereby appeal from said decree to the Supreme Court of the United States, and they pray that this their appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROGER FOSTER,

Solicitor for Complainants and Appellants, The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, 35 Wall Street, New York.

New York, September, 1902.

And now to wit, on Oct. 1st, 1902; it is ordered that the appeal be allowed as prayed for.

E. H. LACOMBE, *U. S. C. J.*

107 Circuit Court of the United States, Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Controller of the City of New York; Alexander E. Orr (Sued as Albert E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (Sued as Charles L. Smith), Morris K. Jesup, Individually and as Members of the Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and The Rapid Transit Subway Construction Company, Defendants.

To the Honorable E. Henry Lacombe, United States circuit judge:

The petition of the Underground Railroad of the City of New York and the Rapid Transit Underground Railroad Company respectfully shows as follows:

I. Heretofore and on or about the 9th day of July 1901, your petitioners The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company duly filed in the circuit court of the United States for the southern district of New York a bill of complaint against the above-named defendants.

II. Subsequently and on or about the 4th day of September, 1901, demurrers to said bill of complaint as amended were separately filed on behalf of defendants therein; and on or about the 18th day of August, 1902, a decree was signed by the Honorable John R.
108 Hazel a district judge of the United States and filed in the clerk's office of this honorable court, which decree sustained said demurrers and dismissed said bill as amended for want of jurisdiction; and on or about the 12th day of September, 1902, by a certificate duly made and signed by said district judge this honorable court duly certified to the Supreme Court of the United States that in this cause the jurisdiction of this court was in issue and further certified said question of jurisdiction.

III. Your petitioners conceive themselves to be grieved by the said decree herein in favor of these defendants and against these complainants in which decree and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the complainants herein all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore your petitioners pray that an appeal may issue in their behalf to the United States circuit court for the southern district of New York for the correction of the errors so complained of, and that a transcript of this cause, duly authenticated may be sent to the Supreme Court of the United States; and that your petitioners may

have such other and further relief in the premises as may be just; your petitioners will ever pray &c.

Dated New York, September 29, 1902.

THE UNDERGROUND RAILROAD OF THE CITY — N. Y.,
By JAMES M. FISK, *Sol'r.*
THE RAPID TRANSIT UNDERGROUND,
By JAMES M. FISK, *Its Sol'r.*

109 (Endorsed:) Circuit court of the United States, southern district of New York.—The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, complainant-, against The City of New York, Robert A. Van Wyck, *et al.* defendants.—Petition and allowance of appeal.—James M. Fisk, complainants' solicitor, 99 Nassau St. New York.—Copy received, Oct. 2, 1902, Strong & Cadwalader att'ys for Rapid Transit.—Copy received Oct. 2, 1902, Boardman, Platt & Soley, per J. T. C.—A copy of the within paper has been this day received at the office of the corporation counsel, Oct. 2, 1902, George L. Rives, corporation counsel.—A copy of the within has this day been received, Oct. 2, 1902, Nicoll, Anable & Lindsay, attorneys for J. B. McDonald.—U. S. circuit court, southern district of New York, Filed Oct. 4, 1902, John A. Shields, clerk.

110 *Assignment of Errors.*

I. The court erred in holding that it had no jurisdiction to set aside the rapid-transit contract described in the amended bill in equity and to enjoin the execution of the same and to enjoin the issue of bonds to raise money to make payments thereunder because of fraud and mistake in the making of said contract.

II. The court erred in holding that it had no jurisdiction of the whole amended bill in equity.

III. The court erred in holding that the statute of the State of New York described in the bill and designated as the rapid-transit act was void as an impairment of the obligation of a contract and consequently forbidden by the Constitution of the United States.

IV. The court erred in holding that the statute of the State of New York described in the amended bill and therein designated as the rapid-transit act attempted to authorize the deprivation of the complainants' liberty and property without due process of law and was consequently forbidden by the fourteenth amendment of the Constitution of the United States.

V. The court erred in dismissing the amended bill for want of jurisdiction.

VI. The court erred in refusing to grant the relief prayed in the amended bill.

JAMES M. FISK,
Sol'r for C'pl'ts.

(Endorsed:) Circuit court of U. S.—Underground Railroad Company of the City of New York and ano. ag'st The City of New York.—Assignment of errors.—Roger Foster, 35 Wall St. New York.—U. S. circuit court, southern district of New York, Filed Oct. 1, 1902, John A. Shields, clerk.

111 Circuit Court of the United States, Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Alexander S. Orr (Sued as Albert E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (Sued as Charles L. Smith), Morris K. Jessup, Individually and as Members of the Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and The Rapid Transit Subway Construction Company, Defendants.

Know all men by these presents: That we, the Underground Railroad of the City of New York and the Rapid Transit Underground Railroad Company, as principals, and the Fidelity and Deposit Company of Maryland, having an office and principal place of business for the State of New York, at No. 35 Wall street, in the borough of Manhattan, in the city of New York, as surety, are held and firmly bound unto the above-named defendants, in the full and just sum of two hundred and fifty dollars, to be paid to the said defendants; for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our corporate seals. Dated the twenty-seventh day of September, one thousand nine hundred and two.

112 Whereas, lately, at a circuit court of the United States, for the southern district of New York, in a suit depending in said court, between The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, complainants, and The City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, individually, and as comptroller of the city of New York; Alexander E. Orr, (sued as Albert E. Orr) John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (sued as Charles L. Smith) Morris K. Jessup, individually, and as members of the board of rapid-transit commissioners of the city of New York, John B. McDonald and The Rapid Transit Subway Construction Company, defendants, a decree was rendered against the said The Underground Railroad of the City of New York and the Rapid Transit Underground Railroad Company; and the said The Underground Rail-

road of the City of New York and The Rapid Transit Underground Railroad Company having obtained a writ of appeal, and filed a copy thereof in the clerk's office in said court, to reverse the decree in the aforesaid suit, and a citation directed to the said defendants, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden at Washington, D. C., on the — day of ——.

Now, the condition of the above obligation is such, that if the said The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, shall prosecute said writ of appeal, to effect, and answer all damages and costs, if they fail to make the said plea good, then this obligation to be void; otherwise, to remain in full force and virtue.

{Seal Underground Railroad Company of the City of New York, 1896.}

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK,
By OGDEN P. PELL, *Sec'y.*

Attest: JAMES M. FISK, *Sol'r.*

{Seal Rapid Transit Underground Railroad Company of the City of New York, 1897.}

113 THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,
By OGDEN P. PELL, *Sec'y.*

Attest: JAMES M. FISK, *Solicitor.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
HENRY B. PLATT, *Vice-President.*

Attest:
[SEAL.] JAMES R. KINGSLEY, *Attorney-in-fact.*

114 STATE OF NEW YORK, } *ss:*
County of New York, }

On this 29th day of September, 1902, before me personally appeared Ogden P. Pell, to me known, who, being by me duly sworn, did depose and say: That he resided at Brooklyn; that he was the secretary of the Underground Railroad of the City of New York, the corporation described in, and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument, was such corporate seal; that it was so affixed by authority of said corporation, and that he signed his name thereto by like order. And the said —— —— further said that he was acquainted with —— ——, and knew him to be the — of said corporation; that the signature of the said —— ——, subscribed to the said instrument, was in the genuine handwriting of the said

—— ——, and was thereto subscribed by like order of the board of directors, and in the presence of him, the said —— ——.

OGDEN PELL.

[SEAL.] ERNEST L. HICKS,
Notary Public, County of New York.

115 STATE OF NEW YORK, } ss:
County of New York, }

On this 29th day of September, 1902, before me personally appeared Ogden P. Pell, to me known, who, being by me duly sworn, did depose and say: That he resided at Brooklyn; that he was the secretary and a director of the Rapid Transit Underground Railroad Company, the corporation described in, and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by authority of the board of directors of said corporation, and that he signed his name thereto by like order. And the said —— —— further said that he was acquainted with —— ——, and knew him to be the — of said corporation; that the signature of the said —— ——, subscribed to the said instrument, was in the genuine handwriting of the said —— ——, and was thereto subscribed by like order of the board of directors, and in the presence of him, the said —— ——.

OGDEN P. PELL,

[SEAL.] ERNEST L. HICKS,
Notary Public, County of New York.

116 STATE OF NEW YORK, } ss:
County of New York, }

On the 27th day of September, in the year 1902, before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York, for the year 1893. And the said Henry B. Platt further said that he was acquainted with James R. Kingsley, and knew him to be the attorney-in-fact of said company; that the signature of the said James R. Kingsley, subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Henry B. Platt.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County.

At a regular and lawful meeting of the board of directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the company, in the city of Baltimore, State of Maryland, on the 6th day of March, 1901, on motion, it was unanimously

"*Resolved*, That in pursuance of section eight hundred and eleven "of the Code of Civil Procedure of the State of New York, Henry B. "Platt, vice-president, or George Sewell Bonner, attorney, or Frank "H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood "and James R. Kingsley, attorneys-in-fact, of this company, in the "State of New York, be, and each of them is, hereby authorized "and empowered to sign, execute and deliver any and all bonds or "undertakings for or on behalf of this company, and to attach thereto "the seal of the corporation, the same to be attested by the said "George Sewell Bonner, attorney of the company, or by either one "of the other persons above named, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, attorney-in-fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 27" day of Sept., 1902.

[SEAL.] JAMES R. KINGSLEY,
Attorney-in-fact.

Fidelity and Deposit Company of Maryland.

Statement, December 31st, 1901.

Resources.		Liabilities.	
Real estate	$600,000 00	Capital stock	$2,000,000 00
Stocks and bonds	2,689,208 00	Surplus and undivided profits	2,778,850 66
Railroad bonds	1,932,035 00	Premium reserve	704,698 55
Net premiums due	82,906 99	Claims in process of adjustment	47,145 30
Cash in bank, etc	387,644 06	Claims reported	161,099 54
	$5,691,794 05		$5,691,794 05

STATE OF NEW YORK, }
County of New York, } *ss:*

James R. Kingsley being duly sworn, says that he is the attorney-in-fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of December 31st, 1901, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 27" day of Sept., 1902.
ERNEST L. HICKS,
[SEAL.] *Notary Public, New York County.*

117 (Endorsed:) Circuit court of the U. S. southern district of N.Y.—The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, complainant, against The City of New York, Robert A. Van Wyck, individually, and as mayor of the city of New York, etc. and others, defendants.—Bond.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendants of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York, Filed Oct. 1, 1902, John A. Shields, clerk.

118 UNITED STATES OF AMERICA, *ss:*

To the City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, individually and as controller of the city of New York; Alexander E. Orr (sued as Albert E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (sued as Charles L. Smith), Morris K. Jesup, individually and as members of the board of rapid-transit commissioners of the city of New York; John B. McDonald, and the Rapid Transit Subway Construction Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the 29th day of Oct. 1902, pursuant to an appeal, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company are appellants and The City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, individually and as controller of the city of New York, Alexander E. Orr (sued as Albert E. Orr) John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (sued as Charles L. Smith), Morris K. Jesup, individually and as members of the board of rapid-transit commissioners of the city of New York, John B. McDonald and The Rapid Transit Subway Construction Company are respondents, to show cause if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 1st day of October, 1902.

E. HENRY LACOMBE,
U. S. Circuit Judge.

119 (Endorsed:) Supreme Court of the United States.—The Underground Railroad of the City of New York, *et al.* appellants, against The City of New York, Robert A. Van Wyck, indi-

vidually and as mayor of the city of New York, *et al.* respondents.—Citation.—A copy of the within has this day been received. Oct. 2, 1902, Nicoll, Anable & Lindsay, attorneys for J. B. McDonald.—Copy received Oct. 2, 1902, Strong & Cadwalader, att'ys for Rapid Transit.—Copy received, Oct. 2, 1902, Boardman, Platt & Soley, per J. T. C.—A copy of the within paper has been this day received at the office of the corporation counsel, Oct. 2, 1902, George L. Rives, corporation counsel.—U. S. circuit court, southern district of New York, Filed Oct. 4, 1902, John A. Shields, clerk.

120 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to one hundred and nineteen inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, appellants, against The City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York, Bird S. Coler, individually and as controller of the city of New York, Alexander E. Orr, (sued as Albert E. Orr) John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (sued as Charles L. Smith), Morris K. Jesup, individaally and as members of the board of rapid-transit commissioners of the city of New York, John B. McDonald and The Rapid Transit Subway Construction Company are appellees, as the same remain of record and on file in my office.

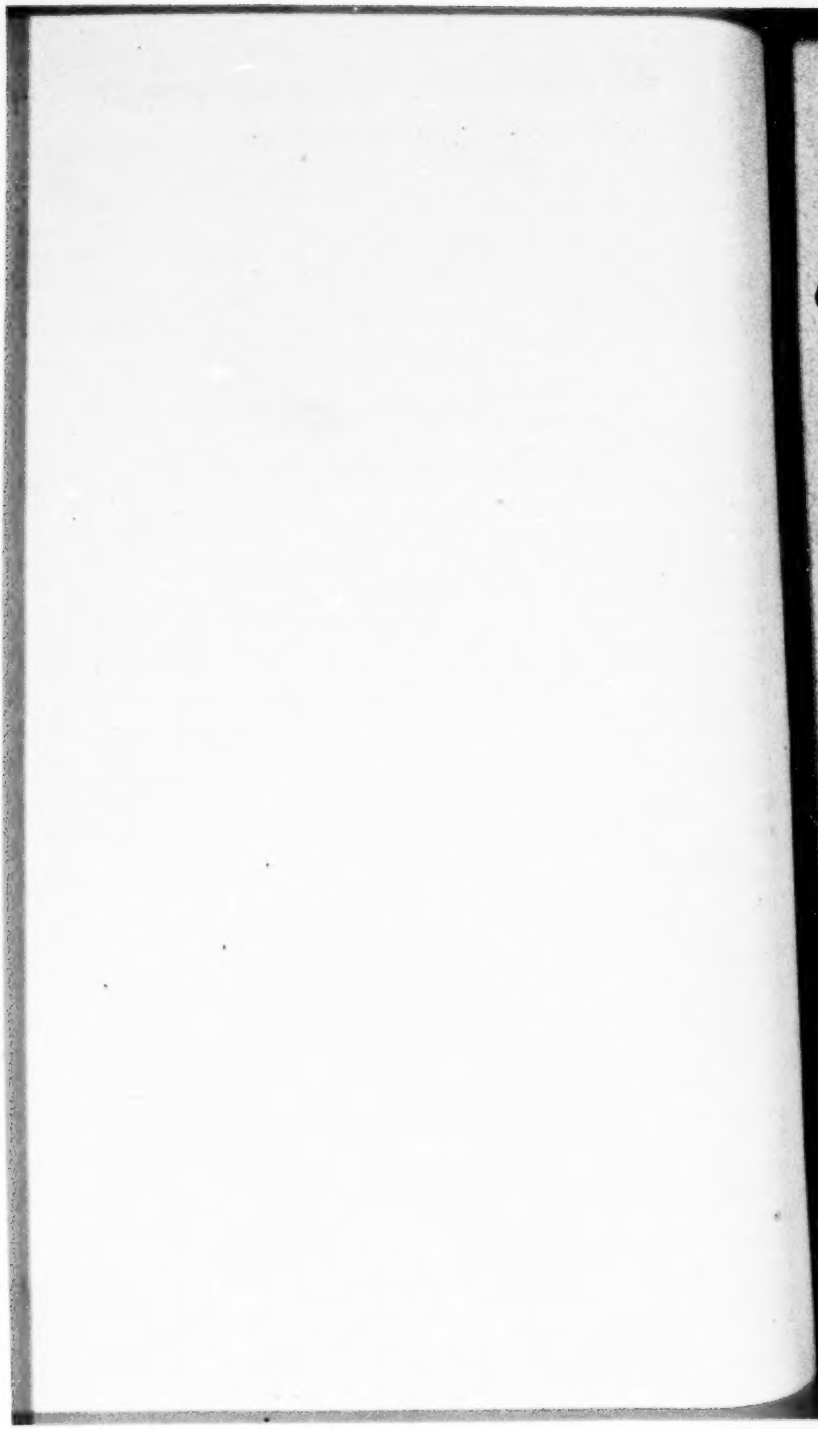
In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 24th day of October in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-seventh.

[Seal of the Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. The Underground Railroad of the City of New York *et al.*, appellants, *vs.* The City of New York *et al.*, appellees. Transcript of record from the circuit court of the United States, for the southern district of New York.

Endorsed on cover: File No. 18,717. S. New York C. C. U. S. Term No. 489. The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, appellants, *vs.* The City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, *et al.* Filed October 28th, 1902.



No. 489

NOV 15 1902
JAMES H. McKENNEY,
Clerk.

SUPREME COURT

Motion to Advance

OF [redacted].

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK, AND THE RAPID TRANSIT RAILROAD COMPANY,

Complainants and Appellants,

against

Filed Nov. 15, 1902.

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, individually, and as Mayor of the City of New York; BIRD S. COLER, individually, and as Comptroller of the City of New York; ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH, and MORRIS K. JESSUP, individually, and as members of the pretended Board of Rapid Transit Commissioners of the City of New York; JOHN B. MC DONALD, and the RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,

Defendants and Respondents.

MOTION TO ADVANCE,

NOTICE, AND [redacted] AFFIDAVIT.

ROGER FOSTER,
Counsel for Complainants and Appellants
35 Wall Street,
New York City.

GEORGE L. RIVES,
Corporation Counsel, Solicitor for the Defendants, the City of New York and Others.

EDWARD M. SHEPARD and
BOARDMAN, PLATT and SOLEY,
Solicitors for the Defendants, the Board of Rapid Transit Commissioners, Alexander E. Orr and Others.

NICOLL, ANABLE and LINDSAY,
Solicitors for the Defendant, John B. McDonald.

STRONG and CADWALADER,
Solicitors for the Defendant, the Rapid Transit Subway Construction

SUPREME COURT

OF THE UNITED STATES.

THE UNDERGROUND RAILROAD of the City of New York, and the RAPID TRANSIT RAILROAD COMPANY,

Complainants Appellants,

against

THE CITY OF NEW YORK, ROBERT A. VANWYCK, individually, and as Mayor of the City of New York; BIRD S. COLER, individually and as Comptroller of the City of New York; ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH and MORRIS K. JESSUP, individually, and as members of the pretended Board of Rapid Transit Commissioners of the City of New York; JOHN B. MCDONALD, and the RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,

Defendants and Respondents.

And now come the appellants, the Underground Railroad of the City of New York, and the Rapid Transit Railroad Company, by Roger Foster, their

counsel, and move this court on the affidavit of James M. Fisk, sworn to on November 20th 1902, and upon the transcript, which has been previously filed herein, and upon all the papers in the proceedings herein, for an order advancing this case and setting it down for oral argument some day during the months of December, 1902, or January, 1903, and for such other and further relief in the premises as may to this Court seem just and meet.

Dated, New York, December 1st, 1902.

ROGER FOSTER,
Counsel for Appellants,
35 Wall Street,
New York City.

SUPREME COURT OF THE UNITED STATES.

THE UNDERGROUND RAILROAD of the City of New York, and the RAPID TRANSIT RAILROAD COMPANY,
Complainants and Appellants,
against
THE CITY OF NEW YORK, ROBERT A. VANWYCK, individually, and as Mayor of the City of New York; BIRD S. COLER, individually, and as Comptroller of the City of New York; ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH, and MORRIS K. JESSUP, individually and as members of the pretended Board of Rapid Transit Commissioners of the City of New York; JOHN B. MCDONALD, and the RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
Defendants and Respondents.

Sirs:

Please take notice that the Underground Railroad of the City of New York and the Rapid Transit Railroad Company, the above named appellants, by Roger Foster, their attorney will, on the first Monday of December, 1902, move the Supreme Court of the United State, upon the affidavit of James M. Fisk, sworn to on November 20th 1902, and upon the transcript which has been previously filed herein, and upon all the papers in the proceedings herein, for an order advan-

cing this cause and setting it down for oral argument upon some day during the months of December, 1902, or January, 1903, and for such other and further relief as to this Court may seem just and meet.

New York, November 10th 1902.

ROGER FOSTER,
Counsel for Appellants,
35 Wall Street,
New York City.

To

George L. Rives, Esq.,
Corporation Counsel,
Solicitor for the defendants the
City of New York and Others;

Edward M. Shepard, Esq., and Messrs.
Boardman, Platt and Soley,
Solicitors for the defendants, the
Board of Rapid Transit Commissioners;
Alexander E. Orr, and Others.

Messrs. Nicoll, Anable and Lindsay,
Solicitors for the defendant, John
B. McDonald;

Messrs. Strong and Cadwalader,
Solicitors for the defendant, the Rapid
Transit Subway Construction Company.

SUPREME COURT OF THE UNITED STATES.

THE UNDERGROUND RAILROAD of the City of New York, and the RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,
Complainants and Appellants,
against
THE CITY OF NEW YORK, ROBERT A. VANWYCK, individually, and as Mayor of the City of New York; BIRD S. COLER, individually, and as Comptroller of the City of New York; ALEXANDER E. ORR (sued as Albert E. Orr), JOHN H. STARIN, WOODBURY LANGDON, CHARLES S. SMITH, (sued as Charles L. Smith), MORRIS K. JESSUP, individually, and members of Rapid Transit Commissioners of the City of New York; JOHN B. MCDONALD, and the RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
Defendants and Respondents.

State of New York, County of New York, ss:

James M. Fisk, being duly sworn, deposes and says: I reside in the City of Newark, County of Essex, State of New Jersey, having an office at No. 93-99 Nassau Street, New York City, and I appeared in the Circuit Court of the United States, for the Southern District of New York, as solicitor for the appellants herein who were the complainants below, in the above case by the Underground Railroad of the City of New York and another against the City of

New York and others, which is now pending in this Court, duly docketed on or about October 25th, 1902, No. 489, of the October Term of 1902. The said complainants, through me as their solicitor, filed a bill in Equity in said Circuit Court of the United States for the Southern District of New York, on or about July
16 5th, 1901. The defendants demurred to said bill on several grounds. After several adjournments obtained by the defendants, against my opposition, said demurrers were argued on or about April 8th, 1902. On or about August 18th, 1902, a decree was made dismissing said bill for want of jurisdiction the question of jurisdiction was duly certified to this Court. Said question of jurisdiction is as follows:

"(1). When a Circuit Court of the United States decides that the complainant to a bill of Equity brought to enforce an alleged right which he claims arises under the Constitution of the United States
17 shows no right arising under the Constitution of the United States, has said Court jurisdiction to decide and hear and determine other matters of equitable cognizance pleaded in said bill which do not arise under either the Constitution of the United States, or a statute or treaty thereof if the complainant and defendant are citizens of the same state?

(2). Has this Court jurisdiction of the said amended bill in Equity?"

The appellants have duly appeared and entered their appearance by Roger Foster as their counsel, and upon information and belief that the respondents have not
18 appeared in this Court, but the following appearances were made in the Circuit Court of the United States for the Southern District of New York: The City of New York, by George L. Rives, as Corporation Counsel, of the City of New York; Robert A. VanWyck, individually, and as Mayor of the City of New York; Bird S. Coler, individually, and as Comptroller of the City of New York; Alexander E. Orr (sued as Albert

E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (sued as Charles L. Smith), Morris K. Jessup, individually and as members of the Board of Rapid Transit Commissioners of the City of New York, by Edward M. Shepard, Esq., and Messrs. Boardman, Platt & Soley; John B. McDonald, by Messrs. Nicoll, Anable & Lindsay; and the Rapid Transit Subway Construction Company, by Messrs. Strong & Cadwalader. The complainants below have duly appealed to this Court from said decree, and they have based their appeal upon the ground that the Court had not jurisdiction of the case and upon the further ground that the case involves the construction of the Constitution of the United States, and is a case in which a law of the State of New York is claimed to be in contravention of the Constitution of the United States. 19

The prayer of said bill is for an injunction against the continuance of the construction by the City of New York, with the aid of the other defendants of an underground railroad under color of a Statute of the State of New York, known as the Rapid Transit Act; and to enjoin the payment by said City and officers of any money under color of said Rapid Transit Act, and from carrying out a contract for such construction which is designated as the Rapid Transit Contract and for other relief. 20

The bill claims that the said Rapid Transit Act of 1897, namely Chapter 4 of the laws of 1891, of the State of New York, as subsequently amended, is a violation and an infringement of the Constitution of the United States for several reasons, amongst others the following: That it impairs the obligations of certain contracts made by the State of New York with the complainants, under which the complainants have obtained an exclusive right to construct an underground railroad upon the land and route whereupon the defendants are constructing the railroad described 21

in said bill. That the said statute authorizes the expenditure of public money and taxes paid by the complainants for a private use and thus takes complainants property without due process of law. That said statute authorizes the expenditure of money of the City of New York, and of taxes paid by the complainants by
22 municipal officers, who are neither elected by the people nor appointed by other public authorities, who have been elected by the survivors of the Rapid Transit Commissioners, originally appointed by said statute, to fill vacancies in said commission and that complainants property is thus taken without due process of law; and that said statute in several other particulars violates the Constitution of the United States.

Said bill further alleges, and it is admitted by said demurrers, that the City of New York is insolvent and has already more indebtedness than is authorized by the Constitution of the State of New York; that the
23 said City proposes to incur additional indebtedness, for the construction of said underground railroad, which will be unauthorized and void; and that it has no means with which to pay for the private properey which it proposes to take in the construction of said raliroad. The said bill further alleges, and it is admitted by the demurrers, that said Rapid Transit Contract was obtained by fraud and undue influence which is described in said bill, and that said contract is void for that reason.

The questions of law which arise upon said bill are numerous, difficult and complicated, and of great public
24 importance; and it is my belief that it will be impossible for counsel to present them upon printed briefs without an oral agreement in such a manner as adequately to protect the rights of the complainants and to relieve the Court of useless labor when rendering its decision.

The question whether the City of New York has exceeded its debt limit, as prescribed by the constitution of said State, has been considered by the Appellate

Division of that State for the First Department, In the Matter of the Application of the Board of Rapid Transit Railroad Commissioners of New York, etc., 5 App. Div. 290, 294, 297, and In the Matter of the Application of the Board of Rapid Transit Railroad Commissioners, etc., 23 App. Div. 472, 475-486. At least two of the Justices of said Court, namely, Mr. Justice Rumsey and Mr. Justice Ingraham, then expressed their opinion that the indebtedness incurred by the construction of said underground railroad would necessarily exceed said debt limit, and Presiding Justice Van Brunt seemed to be of the same opinion. A majority of said Court, however, considered that the decision of this point was then unnecessary. The New York Court of Appeals has never passed upon that question. 25

In the case of the Sun Printing and Publishing Co. vs. The Mayor, etc., of the City of New York, 152 New York, 257, the New York Court of Appeals passed upon certain objections to the constitutionality of said Rapid Transit Act which were founded upon the Constitution of the State of New York, but none of the constitutional questions above specified by me have ever been passed upon by said Court of Appeals. 26

The interests of the complainants and the public interest both demand an immediate hearing of and disposition of this appeal. Pending this suit the defendants have continued the construction of the said underground railroad and the City of New York has expended for that purpose several millions of dollars, and defendants are about to expend out of the municipal funds of said City much more money in order to defray the expenses of said construction. The complainants offered in said bill, if their rights are enforced and protected, to pay to the City of New York, all the money it has advanced for said construction. The interests of the City of New York, and of persons dealing in its bonds demand that the questions raised by 27

this bill be decided as speedily as may be. Some of the defendants have announced in public print in the City of New York that they expect to commence operation of the said underground railroad during the year 1903, under a lease of the same, provision for which is made in said Rapid Transit Contract. It is important to protect the rights of the complainants and of the City of New York, that before that time the person legally entitled to operate said railroad should be ascertained by a speedy adjudication of this Court. If this case is heard in its regular order it cannot be reached and decided before the early part of the year 1904, as I am informed and believe.

JAMES M. FISK.

Sworn to before me November 20th, 1902.

D. McLean Shaw

Notary Public.

(Notarial Seal).

13731

FILE COPY.

Supreme Court of the United States.

October Term 1902 No. 150.

18,717.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK AND THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,
Complainants, Appellants,
against
THE CITY OF NEW YORK, ROBERT A. VAN WYCK, individually and as Mayor of the City of New York; BIRD S. COLER, individually and as Comptroller of the City of New York; ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH, AND MORRIS K. JESSUP, individually and as members of the pretended Board of Rapid Transit Commissioners of the City of New York, JOHN B. MCDONALD AND THE RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
Defendants, Respondents.

Office Supreme Court U. S.
FILED
APR 13 1903
JAMES H. McKENNEY,
Clerk.

Dear Sirs:

PLEASE TAKE NOTICE that on Monday, April 20, 1903, or if this Court is not then in session, on the next succeeding motion day thereof, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard in the Capitol at Washington in the District of Columbia, I shall submit the above entitled appeal

to the Supreme Court of the United States upon the question of the jurisdiction of the Circuit Court of the United States for the Southern District of New York, over the bill in equity herein filed in said Court as subsequently amended; and that I shall then and there move the Supreme Court of the United States for such other and further relief in the premises as may be just. A copy of the brief for the appellants, which I shall then submit, is herewith served upon you.

New York, March 21st, 1903.

Yours, &c.,

ROGER FOSTER,

Counsel for Complainants-Appellants,

35 Wall Street,

New York.

To Hon. George L. Rives,

Counsel to the Corporation,

Solicitor for Defendants, Respondents, the City of New York, Robert A. Van Wyck, individually and as Mayor of said City, Bird S. Coler, individually and as Comptroller of said City.

Messrs. Boardman, Platt & Soley

and Edward M. Shepard, Esq.,

Solicitors for Defendants, Respondents Orr, Starin, Langdon, Rives, Smith and Jesup, individually and as Rapid Transit Commissioners.

Messrs. Strong & Cadwalader,

Solicitors for Defendants, Respondents Rapid Transit Subway Construction Company.

Messrs. Nicoll, Anable & Lindsay,

Solicitors for Defendant Respondent John B. McDonald.

SUPREME COURT OF THE UNITED STATES.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK AND THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,
Complainants, Appellants,
against
THE CITY OF NEW YORK, ROBERT A. VAN WYCK, individually and as Mayor of the City of New York; BIRD S. COLER, individually and as Comptroller of the City of New York; ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH, AND MORRIS K. JESSUP, individually and as members of the pretended Board of Rapid Transit Commissioners of the City of New York, JOHN B. MCDONALD AND THE RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
Defendants, Respondents.

Submission and Motion.

And now come the appellants, the Underground Railroad of the City of New York and the Rapid Transit Underground Railroad Company, by Roger Foster their attorney, and submit their appeals herein in accordance with the order of this Court of December 8th, 1902, and move this Court for such other and further relief in the premises as may be just.

Washington, District of Columbia, April 20, 1903.

ROGER FOSTER,
Counsel for Appellants.

13733

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902. No. 450.

Office Supreme Court U. S.
FILED
APR 13 1903
JAMES H. McKENNEY,
Clerk.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and the Rapid Transit Underground Railroad Company,
Complainants, Appellants,

against

THE CITY OF NEW YORK, Robert A. Van Wyck, individually and as Mayor of the City of New York, Bird S. Coler, individually and as Comptroller of the City of New York, Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith and Morris K. Jesup, individually and as Members of the pretended Board of Rapid Transit Commissioners of the City of New York, John B. McDonald, and the Rapid Transit Subway Construction Company,
Defendants, Respondents.

BRIEF FOR COMPLAINANTS, APPELLANTS.

ROGER FOSTER,
Of Counsel for Complainants, Appellants.

18,717.

Supreme Court of the United States.

THE UNDERGROUND RAILROAD of the City of New York and the Rapid Transit Underground Railroad Company,
Complainants, Appellants,

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, individually, and as Mayor of the City of New York; Bird S. Coler, individually, and as Comptroller of the City of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith and Morris K. Jessup, individually and as members of the pretended Board of Rapid Transit Commissioners of the City of New York; John B. McDonald and the Rapid Transit Subway Construction Company,
Defendants, Respondents.

Brief for Complainants, Appellants.

Statement.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York dismissing a bill in equity as amended for want

of jurisdiction. The bill prayed an injunction against the construction and operation of an underground railroad and subway on Manhattan Island, in the City of New York, upon a route to which the complainants, who are taxpayers, have a prior exclusive right, and against the payment by the defendants, who are or claim to be municipal officers, of any money under color of the Rapid Transit Act, to the defendants McDonald and Subway Construction Company, or to any one, and against their issuing bonds or stock of the City of New York under color of the Rapid Transit Act, or to obtain money to aid in the construction of such underground railroad; and for a receiver to take possession of so much of the underground railroad as is already constructed. The complaint also contains the prayer for general relief under which a decree might be granted computing the payment of the value of the complainants' franchises, in lieu of an injunction.

(*New York vs. Pine*, 185 U. S., 93.)

The complainants have tendered to the defendant the City of New York and offer to pay it all sums of money heretofore paid by the city for the construction of the subway.

The demurrers, which are all alike, allege that the Court has no jurisdiction in the premises, because the parties to the suit are citizens of this state and it is claimed that the suit does not involve any question arising under the Constitution or laws of the United States; that the bill does not state a case entitling the complainants in a court of equity to any relief; that the bill is multifarious, by a misjoinder of defendants without showing any reasons for the multifariousness; and laches.

These demurrers admit the following facts, which are set forth in the bill: The Central Tunnel Railway Company which has been merged, by consolidation, in

the complainant, the Underground Railroad of the City of New York, and which has leased its route to the other complainant, the Rapid Transit Underground Railroad Company was organized on March 26th, 1881, under the General Railroad and Tunnel Law of the State of New York (L. 1850, Ch., 140; L. 1880, Ch., 582). Subscriptions were duly made for stock of that corporation to the extent of two thousand dollars for each mile of its proposed railroad, and more than fifty per cent. of the par value of the stock was paid in cash to the corporation by the subscribers before the articles of association were filed. On March 28th, 1882, a map and profile of the route adopted was duly signed and certified by the president, engineer and a majority of the Board of Directors of the company, and filed in the office of the Register of the County of New York, in accordance with Section 45 of the General Railroad Law then in force (L. 1850, Ch. 140).

The route therein described, and which is specifically set forth in the articles of association annexed to the bill (Exhibit A), was five miles in length, underground, and extended from City Hall Park under Elm Street and other streets to and under Forty-second Street at the Grand Central Depot, connecting with the Fourth Avenue Improvement and viaduct.

> "Written notice of the time and place where "said map and profile were filed, and that the "route described thereon passed over the lands "of such occupants, was duly given by said cor- "poration on or before June 20th, 1882, to all "the occupants of land over which the route of "said railroad and tunnel was so designated. "The route and line of said corporation were "duly surveyed, costly plans, estimates and "specifications for its construction were made,

"and *more than a hundred thousand dollars was*
"*spent by said corporation in surveying, prepar-*
"*ing plans and specifications and preparing for*
"*the construction of the railroad and tunnel de-*
"*scribed in its articles of association and maps*"
(p. 4, fol. 8).

The Tunnel Law (N. Y. L. 1880, Ch. 582, § 1), which is quoted in full in the bill, provides that, in case the consent of the municipal authorities and the owners of property bounded on the line cannot be obtained when the railroad company intends to build the whole or part of its railroad in any city, the General Term of the Supreme Court in the district:

"May, upon application, appoint three com-
"missioners, who shall determine, after hearing
"other parties interested, whether such railroad
"ought to be allowed to be built underneath said
"street, roads and public places, or any of them,
"and in what manner the same may be so built
"with the least damage to the surface and to
"the use of the surface by the public; and the
"determination by said commissioners, con-
"confirmed by the Court, may be taken in lieu
"of the consent of said authorities and proper-
"ty owners."

The Central Tunnel Railway Company, having failed to obtain the consent of the property owners, applied to the General Term of the Supreme Court for the First Department for the appointment of commissioners in accordance with this statute. On February 2nd, 1883, the General Term made an order, a copy of which is annexed to the bill and marked "Exhibit B," granting the application and appointed as commissioners Wm. G. Choate, John T. Agnew and James McLean. Messrs. Choate and McLean accepted their appointment, qualified and entered upon the discharge

of their duties. Proceedings under the order before them are still pending and undetermined, for the following reasons: Mr. Agnew declined to accept the appointment and refused to qualify. The corporation then applied to the General Term for the appointment of a commissioner in his place. William R. Grace was duly appointed. Mr. Grace declined the appointment and refused to serve. Thereupon the corporation duly applied to the General Term for the appointment of a third commissioner to fill the vacancy, and at the same time offered to deposit in any place which the Supreme Court might designate the sum of $5,000 as security for the payment of the expenses of the commissioners. *The application was granted,* and the order providing for filling the vacancy, but leaving the name of the new commissioner in blank to be supplied by the Court, was duly drafted by the attorney for the corporation and submitted to the General Term. Neither the General Term nor its successor, the Appellate Division, has ever filled said vacancy, or signed or entered this order. For that reason the corporation has been unable to proceed before the commissioners (p. 7, fols. 12, 13).

We ask the Court to take judicial notice of the fact that during all this time proceedings were pending before the Legislature and the municipal boards to procure the widening of Elm Street. These did not result in the appointment of the Elm Street Commissioners of appraisal till 1895. The proceedings before those commissioners were not pending and the Street was not widened until after 1898. (*Re Elm Street*, 46 App. Div. 624.) The previous construction of the complainants' tunnel under Elm Street would have interferred with that project and greatly increased the expenses of the improvement. *This seems to have been the reason for the delay of the State Court in filling the vacancy in the Complainants' Commission.*

Proceedings by Central Tunnel Railway Company.

On August 21st, 1896, the Central Tunnel Railway Company, together with two other corporations, the lines and routes of which formed a continuous and connected line with its line and routes, were duly merged and consolidated into a new corporation, the Underground Railroad of the City of New York, which is one of these complainants. The articles of consolidation and incorporation of the Underground Railroad of the City of New York were duly filed in the office of the Secretary of State of New York on October 2nd, 1896, and a tax one-eighth of one per centum on its capital stock was duly paid to the state by the corporation and its incorporators. These articles of consolidation and incorporation, set forth in paragraph five of the bill, describe its route as including that of the Central Tunnel Railway Company. A map and profile of the route was duly signed, certified and filed in the office of the Register on June 10th, 1897. (pp. 10-12 fols. 17-20.)

Afterwards, on April 9th, 1897, the other complainant, the Rapid Transit Underground Railroad Company, was duly organized under and pursuant to Chapter 39 of the General Laws. A certificate of incorporation was then duly filed in the office of the Secretary of State and the Clerk of the County of New York. The length, termini and route, as stated in the certificate, included that of the Central Tunnel Railway Company, and also extended from the Grand Central depot westerly through and under Forty-second Street and the cross streets to Broadway, and thence northerly under Broadway and the cross streets to and under Fifty-ninth Street; thence northerly through and under the Boulevard and Eleventh Avenue and under the cross street to One Hundred and Fifty-fifth Street. A franchise tax of one-eighth of one per cent. upon the capital stock was paid by the corporation to the

state. By the acceptance of the franchise tax from these two companies the State of New York entered into a contract with them granting to them the exclusive right and franchise to construct and operate a railroad upon the route specified in their articles of incorporation. This corporation has since paid taxes to the City, County and State, and is a taxpayer. (pp. 12, 13, fols. 21-23.) On October 11th, 1897, the Rapid Transit Underground Railroad Company filed a map and profile of its route, duly certified in the office of the Register of the City and County of New York, and a duplicate original of the same in the office of the clerk of the county, and written notice of the time and place of said filing was duly given to all the occupants of the land over which the route of the railroad was designated (p. 14, fol. 23).

On April 29th, 1897, the Underground Railroad of the City of New York leased to the Rapid Transit Underground Railroad its railroad routes and franchises for the term of the corporate existence of the Rapid Transit Underground Railroad Company, in accordance with the General Railroad Law (N. Y. General Laws, Ch. 39, Art. III). The contract provided, in accordance with §79 of the law, for a consideration in cash, which was duly paid, and for the exchange of the stock of the lessor for the stock of the lessee company (p. 14, fols. 23, 24). This exchange was duly made and the contract duly ratified by the stockholders and directors of both corporations. By these proceedings the Rapid Transit Underground Railroad Company acquired the exclusive franchise to build and operate a railroad and tunnel over the route hereinbefore described.

On April 6th, 1898, the Appellate Division of the Supreme Court for the First Department, the consent of the Common Council, Mayor and legal authorities of the City of New York having been previously duly

obtained, confirmed the report of commissioners previously appointed, determined that a railroad and tunnel should be constructed and operated upon the route described in the articles of incorporation of the Central Tunnel Railway Company and the Rapid Transit Underground Railroad Company, and granted a consent to the construction of said route in lieu of the consent of the property owners bounding thereupon. This consent was made upon the application of the defendants, the Board of Rapid Transit Commissioners; but the plans and specifications which they proposed were the same plans and specifications, that had been adopted by the Central Tunnel Railway Company, prepared by engineers who had formerly been in the employ of the Central Tunnel Railway Company; and the consent thus given inured to the benefit of the persons who had an exclusive franchise to construct a railroad and tunnel on said route; namely, these complaints (p. 28, fols. 46, 47).

> "The said defendants, by force and threats, "have hitherto prevented your orators from "constructing a street railway and tunnel upon "said route" (p. 28, fol. 27).

The defendants McDonald and the Rapid Transit Subway Construction Company, with the connivance and assistance of the other defendants, are now engaged in constructing an underground railroad and tunnel upon the route specified in the articles of association of the Central Tunnel Railway Company and the Rapid Transit Underground Railroad Company, as is hereinbefore described, and to which these complainants have obtained an exclusive right and franchise as hereinabove set forth. They are doing this under color of an alleged contract with the City of New York, known as the Rapid Transit Contract, and other proceedings under the so-called Rapid Transit Act of 1891, as subsequently amended (N. Y. L. 1891,

Ch. 4). The material provisions of this act are set forth in full in the bill in equity. This act, which is alleged by the complainants to be unconstitutional, appoints "in each city having over one million inhabi-"tants according to the last preceding National or "State census," a Board of Rapid Transit Commissioners, consisting of five persons therein named, the mayor and comptroller of the city and President of the Chamber of Commerce of the City of New York.

> "Vacancies which may take place in the "offices so held by the persons specifically "named as such commissioners shall be filled "by a majority vote of the remaining members "of said board" (§1).

The commissioners are authorized to expend money of the city and to receive compensation for their services (§§61, 62). The act purports to authorize the Rapid Transit Commisioners to construct an underground railroad upon the route selected by them at the expense of the city, and for that purpose to enter into a contract for the construction of a railroad upon such routes in accordance with the plans and specifications adopted by the commissioners at a price fixed by them which the city shall pay to such contractor (§34). The act further purports to authorize the board to agree with the contractor, that he shall equip, maintain and operate the railroad thus constructed for a term of years specified in the contract, not less than thirty-five or more than fifty years, and for a subsequent renewal of said lease (§34). The contractor is required by the law to give a bond to the city in such amount as the board may require, with sureties to be approved by the board, who shall justify in the aggregate in double the amount of the bond (§34). The act purports to authorize the board and all persons acting under its authority to take possession of all the lands and properties, which it deems neces-

sary to be acquired, or appurtenant to which there may be franchises, easements or privileges which it deems necessary to be acquired or extinguished by the city; to prepare maps designating the same and to procure the same to be filed in the Department of Public Works and other public offices (§40). It then provides that the counsel to the corporation shall present to the Supreme Court a petition by the board praying for the appointment of Commissioners of Appraisal (§ 43); that the Commissioners of Appraisal shall be appointed after certain notices under the act described; that they shall take and file the constitutional oath (§46); that upon filing said oath the city shall acquire the fee and absolute ownership to all parcels of property described in the map or appurtenant to the same before the award of the value thereof to the owner and before payment of any compensation to them (§47).

The demurrer admits that the City of New York has already incurred indebtedness in excess of its debt limit, and the following allegations:

> *"The said City of New York is insolvent.*
> "Any indebtedness and any claim against the "City of New York attempted to be created "for the benefit of property holders upon the "route of said Underground Railroad will be, "and any such indebtedness or claim heretofore "sought to be created on their behalf is and "has been, null and void for the reason that the "same is and has been forbidden by the said "Article of the Constitution of the State of "New York hereinbefore quoted" (p. 20, fol. 34).

On February 24th, 1900, under color of the Rapid Transit Act, the Rapid Transit Board entered into the Rapid Transit Contract with the defendant McDonald. This purports to bind the City of New York to pay to

the said contractor the sum of $36,500,000 for the construction of an underground railroad and tunnel in New York City along the route of the complainants; and purports to grant to him the right to operate a railroad upon this route for the period of fifty years, with a right of renewal for a further period of twenty-five years (pp. 28, 29, fol. 47).

This contract is void for a number of reasons set forth in the bill in equity. It was entered into under mistakes of fact and law on the part of the Rapid Transit Board and the City of New York, and by fraud and imposition and undue influence practiced upon them by the defendant McDonald and the Subway Company and by "persons with great political influ-"ence in the City of New York, some of whom were "City officers and were secretly interested in the said "contract and in the said Rapid Transit Subway Con-"struction Company, and who dominated the action "of the persons who executed said Rapid Transit Con-"tract on the part of the City of New York" (p. 29, fol. 47). At the time when said contract was executed, the board and city believed that Sections 3 and 14 of the Labor Law of the State of New York (L. 1897, Ch. 415; G. L. Ch.) were valid, and consequently they inserted in the Rapid Transit Contract a promise by the contractor, that he would obey those sections of the labor law and pay and compel the payment of the prevailing rate of wages to all workmen upon the subway and tunnel, use no stone in its construction which had been worked, dressed or carved outside the State of New York, and allow no laborers to work more than eight hours a day upon said work. The contract provided that in case of a disobedience to any part of this stipulation the contract should be null and void. By reason of the insertion of these clauses in this contract and the expectation that the same would be obeyed by the contractor,

it was believed by the Rapid Transit Board and municipal authorities that the cost of construction would be increased at least twenty per cent. and the contract price for said work set forth in the contract was increased twenty per cent. accordingly. Mr. McDonald had then been secretly advised that these sections of the Labor Law were unconstitutional and void, and he did not then intend to obey them. He procured his counsel to institute and argue two test cases before the Court of Appeals of the State of New York (*People ex rel. Rogers vs. Coler*, 166 N. Y., 1, and *People ex rel. Treat vs. Coler*, 166 N. Y., 144), in which a majority of that Court held, that so much of the Labor Law as forfeits contracts for a failure to pay the prevailing rate of wages to workmen and for the use of stone worked, dressed or carved outside of the State of New York, were unconstitutional and void, and that the nullification of this clause in such contracts did not impair nor affect the validity of the remaining clauses therein. The contractor and his asignee have disobeyed and intend to disobey these clauses in the Rapid Transit Contract; and have compelled laborers to work more than eight hours a day upon the work, thus forfeiting the contract, since the Eight Hour Law has not been impugned by the New York Courts (pp. 29, 30, fols. 48, 49).

Before letting the contract to Mr. McDonald, the commissioners advertised for proposals and bids for the contract, and stated in their advertisements as one of the conditions of said contract that the contractor must bind himself to furnish sureties for the faithful performance of the contract in the sum of $5,000,000; and that each of the sureties must be bound for at least $500,000 dollars of the penalty and justify in double the amount for which he is bound.

"Before said Rapid Transit contract was exe-
"cuted, they secretly agreed with said defend-

"ant McDonald that the terms of the same "would be modified so as to diminish by one-"half security for the performance of the said "contract, required of the said McDonald in the "draft of the contract as originally submitted "and as incorporated in said invitation; and up-"on the same day that said Rapid Transit "contract was executed an agreement was made "purporting to be a modification of said con-"tract in that respect; and no security in ac-"cordance with the original contract and the "original invitation to submit proposals and "bids has been given by the said McDonald or "by any one." "Had it been announced in the "said invitation to contract that said Rapid "Transit contract would be thus modified and "that the security for its performance would be "thus diminished, other contractors would have "offered to accept said contract for much less "compensation than is under the provisions of "said contract to be paid to the said defendant "McDonald" (p. 30, fols. 49, 50).

The contract has been assigned by the defendant McDonald to the defendant the Rapid Transit Subway Construction Company. These two defendants and the persons who own the legal and equitable interest in the stock and control the Construction Company have procured the organization of a corporation named the Subway Realty Company. In the name of this corporation they have bought and are now buying,

"real estate necessary for the construction "and operation of said railroad for the purpose "of leasing or selling the same, or parts thereof, "to the City of New York, at an exorbitant "price. Such conduct by him and by them "is a violation of the expressed and implied "terms and conditions of said Rapid Transit

"contract. The said Rapid Transit contract is "for these and other reasons void, and not "binding upon the City of New York" (p. 30, fol. 50).

The assignee of the Rapid Transit contract, the defendant the Rapid Transit Subway Construction Company, has not been organized under the railroad laws of the State of New York, but is a business corporation organized under the Business Corporation Law of the State of New York, (N. Y. General Laws, Ch. XLI, L. 1892, Ch. 691) and it has no power under this law or under its articles of incorporation either to construct or to operate a railroad. Since its incorporation it has applied to the New York Legislature for authority to construct and operate the railroad and tunnel specified in the Rapid Transit contract, but the Legislature has refused to grant it such permission (p. 31, fol. 51).

In accordance with the rules of this Court we here insert our

Assignment of Errors.

I. The court erred in holding that it had no jurisdiction to set aside the rapid transit contract described in the amended bill in equity and to enjoin the execution of the same and to enjoin the issue of bonds to raise money to make payments thereunder because of fraud and mistake in the making of said contract.

II. The court erred in holding that it had no jurisdiction of the whole amended bill in equity.

III. The court erred in holding that the statute of the State of New York described in the bill and designated as the rapid transit act was not void as an impairment of the obligation of a contract and consequent forbidden by the Constitution of the United States.

IV. The court erred in holding that the statute of the State of New York described in the amended bill

and therein designated as the rapid transit act did not attempt to authorize the deprivation of the complainants' liberty and property without due process of law and was consequently forbidden by the fourteenth amendment of the Constitution of the United States.

V. The court erred in dismissing the amended bill for want of jurisdiction.

VI. The court erred in refusing to grant the relief prayed in the amended bill.

I.
This Court has Jurisdiction of the Appeal.

> The Evarts Act in §5 gives this Court jurisdiction: "In any case in which the jurisdiction "of the court is in issue; in such cases the question of jurisdiction alone shall be certified to "the Supreme Court for decision; in any case "that involves the constitution or application "of the Constitution of the United States * * * "in any case in which the constitution or a law "of a State is claimed to be in contravention of "the Constitution of the United States." (27 St. at L. 183).

This appeal is taken upon all three grounds. Since the decree sustained the demurrers upon the sole ground that the Circuit Court had no jurisdiction of the bill, no certificate was required. (*Excelsior Pipe* v. *Pacific Bridge Co.*, 185 U. S., 2825.)

The Circuit Court, moreover, has sent up a certificate stating that a question of jurisdiction was at issue.

This certificate, after reciting the demurrers and the proceedings, states that the following questions of jurisdiction are at issue.

II. Jurisdiction of the Circuit Court.

(1) "When a Circuit Court of the United "States decides that the complainants to a bill "of equity brought to enforce an alleged right "which he claims arises under the Constitution "of the United States shows no right arising "under the Constitution of the United States, "has said court jurisdiction to decide and hear "and determine other matters of equitable "cognizance pleaded in said bill, which do not "arise either under the Constitution of the "United States or a statute, or a treaty thereof; "if the complainant and defendant are citizens "of the same state?

(2) "Has this Court jurisdiction of the said "amended bill in equity?" (p. 62 fols. 104, 105).

This seems to show that the Circuit Court understood that so much of the bill as set up matters not arising under the Constitution of the United States was good. It further indicates that the Judge considered the Federal question raised by the bill were sudstantial and not frivolous. Otherwise the certificate would have so stated.

II.
The Circuit Court had Jurisdiction of the Bill.

The statute gives the Circuit Courts of the United States "original cognizance concurrent with the courts of the several States of all suits of a civil nature, at common law or in equity * * * arising under the Constitution laws of the United States." (25 Sts. at L. p. 433).

This suit was brought to enforce and protect rights founded upon those clauses of the Constitution of the

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United States, which forbid the States from impairing the obligation of contracts, from taking property without due process of law and from denying the equal protection of the laws.

The learned Judge was mislead by the cases arising upon writs of error to the State Courts and supposed that the same rules which applied to the appellate jurisdiction of this Supreme Court upon such writs of error limited the jurisdiction of the Circuit Courts in suits of which they have original cognizance. In this he was mistaken.

> In *Swafford* v *Templeton*, 185 U. S. 487, 493, 494; this Court said speaking through Mr. Justice White:
>
> "It results from what has just been said that "the court erred in dismissing the action for "want of jurisdiction, since the right which "it was claimed had been unlawfully invaded "was one in the very nature of things arising "under the Constitution and laws of the United "States, and that this inhered in the very sub- "stance of the claim. It is obvious from an "inspection of the certificate that the court, in "dismissing for want of jurisdiction was con- "trolled by what it deemed to be the want of "merit in the averments which were made in "the complaint as to the violation of the Federal "right. But as the very nature of the con- "troversy was Federal, and, therefore, juris- "diction existed, whilst the opinion of the Court "as to the want of merit in the cause of action "might have furnished grounds for dismissing "for reason, it afforded no sufficient ground for "deciding that the action was not one arising "under the Constitution and laws of the United "States.

II. Jurisdiction of the Circuit Court.

"True, it has been repeatedly held that, on "error from a State court to this court, where "the Federal question asserted to be contained "in the record is manifestly lacking all color of "merit, the writ of error should be dismissed. "But *the doctrine referred to has no application "to a case brought in a Federal court where "the very subject matter of the controversy is "Federal, however much wanting in merit may "be the averments which it is claimed establish "the violation of the Federal right.* The dis- "tinction between the cases referred to and the "one at bar is that which must necessarily exist "between controversies concerning rights which "are created by the Constitution or laws of the "United States, and which consequently are in "their essence Federal and controversies con- "cerning rights not conferred by the Constitu- "tion or laws of the United States, the con- "tention respecting which may or may not in- "volve a Federal question depending upon what "is the real issue to be decided or the sub- "stantiality of the averments as to the existence "of the rights which it is claimed are Federal "in character. The distinction finds apt illustra- "tion in the decisions of this court holding that "suits brought by or against corporations "chartered by acts of Congress are cases *per "se* of Federal cognizance, *Osborn* v. *U. S. "Bank*, 9 Wheat. 817; *Texas & Pacific R. R.* v. "*Cody*, 166 U. S. 606. It may not be doubted "that if an action be brought in a Circuit Court "of the United States by such a corporation "there would be jurisdiction to entertain it, "although the averments set out to establish "the wrong complained of or the defense inter-

"posed were unsubstantial in character. The "distinction is also well illustrated by the case "of *Huntington* v. *Laidley*, 176 U. S. 668, "where, finding that jurisdiction obtained in a "Circuit Court, this Court held that it was error "to dismiss the action for want of jurisdiction "because it was deemed that the record estab- "lished that the cause of action asserted was "not well founded."

The cases are collected in *Riverside & A. Ry. Co.* v. *City of Riverside*, 118 Fed. R., 736, 740, by Wellborn:

"It is essential to Federal jurisdiction under "said constitutional provisions, that there "should really be a valid contract or that the "impaired or deprivation complained of "should really be effected through legislation "or other action of the state, but it is sufficient "if these grounds of suit are claimed in good "faith and not frivolously. *City R. Co.* v. "*Citizens' St. R. Co.*, 166 U. S. 558, 17 Sup. "Ct. 653, 41 L. Ed. 1114; *Illinois Cent.* R. R. Co. "v. *City of Chicago*, 176 U. S. 646, 20 Sup. Ct. "509, 44 L. Ed. 622; *Yazoo & M. V. R. Co.* v. "*Adams*, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. "Ed. 395; *Illinois Cent. R. Co.* v. *Adams*, 180 "U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; "*Pen. Mut. Life Ins. Co.* v. *City of Austin*, "168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. "626; *Hamilton Gaslight & Coke Co.* v. *City* "*of Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90, "36 L. Ed. 963; *Michigan Tel. Co.* v. *City of* "*Charlotte* (C. C.) 93 Fed. 13; *Vicksburg* "*Waterworks Co.* v. *City of Vicksburg*," supra. "808 Fed."

In Pacific Electric Co. v. *City of Los*

Angelos, 118 Fed. R. 746, 752, the same Judge said:

"On the question of jurisdiction, complain-
"ant contends that the proceedings set forth
"touching the street railway franchise in ques-
"tion, up to and including the acceptance ap-
"proval and filing of the bond required by the
"statute, constituted a complete and valid con-
"tract between said city and complainant, and
"vested in the latter said franchise, and that the
"resolution or orders of said council, and the
"other proceedings taken and threatened for
"the purpose of vacating and setting aside said
"contract, are within the prohibitions of section
"10 of article 1 of the constitution of the United
"States, and section 1 of the fourteenth amend-
"ment to said constitution. The writer of this
"opinion has recently (November 1, 1902) de-
"cided a case in this court (*Riverside & A. Ry.*
"*Co.* v. *City of Riverside,* 118 Fed. 736), whose
"jurisdiction features bear such close resem-
"blance to those here presented that the opinion
"in that case may be fittingly adopted in this,
"and for the reason and upon the authorities
"there given and cited, complainant's conten-
"tion here as to a Federal question is sustain-
ed."

He then held: that the complaint had acquired no rights; that no contract had been made between it and the City; and he dismissed the bill upon the merits while he took jurisdiction of the same.

City Railway Co., vs. *Citizens' Street R. R. Co.,* 166 U. S., 557, 563, per Mr. Justice Brown:

"All that is necessary to etablish the juris-
"diction of the court is to show that the com-

"plainant had or *claimed in good faith to have,*
"a contract with the city, which the latter had
"attempt to impair."

All it is necessary to show in order to secure a reversal of the decree is that the complainants claim a franchise and that all of their objections to the constitutionality of the Rapid Transit Act are not so manifestly frivolous and without color of right as conclusively to prove bad faith upon their part. The undisputed fact, that they have spent more than $100,000 in reliance upon the validity of that franchise would seem to establish their good faith. The length of Judge Hazel's opinion seems to show that he considered their claims resious. There is nothing there nor in his certificate to indicate that he thought any of them were made in bad faith or frivolous.

III.

Having jurisdiction of the Federal questions raised by the bill the Court had also jurisdiction of the whole bill including all questions that were not Federal.

(a) As the demurrer was to the whole bill no part of it can be attacked. (*Atwill* v. *Ferrett*, 2 Blatch. 39; *Chicago St. L. N. C. R. Co.* v. *Ferrett*, 2 Blatch, 39; 18 *Story's Eq. Pl.*, §§457, 458.)

(b) The matters pleaded by the complainants which do not depend upon the Constitution of the United States relate to fraud, mistake, corruption and undue influence in the execution of the Rapid Transit Contract. These are other grounds for the same relief that is the object of the appeal to the protection of the Constitution, namely, the cancellation of the con-

tract and an injunction against its enforcement, in which plaintiffs are interested as taxpayer as well as owners of the franchise upon which that contract infringes. Equity abhors a multiplicity of suits.

Interest rei publica ut sit nis litum. The conclusiveness of *res adjudicata* would make a decree dismissing this bill upon the merits a bar to a subsequent suit in the State Court for the same relief, an injunction against the performance of the Rapid Transit Contract, upon any grounds whether pleaded in this bill or not.

> In *Werlein v. New Orleans*, 177 U. S. 390, 399, this Court said, speaking through Mr. Justice Pecktown:
>
> "We think it was the duty of the city to set "up in that suit and to prove any and all "grounds that it had to support the alle- "gation that Klein had no right to seize "or sell the property. The threatened sale "might have been illegal for a number of "reasons, based upon widely divergent facts, "but whatever those reasons were, the fact "upon which they rested were open to proof "in the chancery action, and if the city desired "the benefit of them, they should have been "alleged and proved. It would seem to be quite "clear that the plaintiff could not be permitted "to prove each independent fact in a separate "suit. Suppose the city had only set up the fact "of the registry of the judgment, as a ground "for enjoining the sale, and after a trial on that "issue it had been beaten and judgment had gone "against it, could the city after that have com- "menced another suit for the same purpose, and "set up as a ground for the alleged illegality of "the sale, the assignment of the judgment by

"Klein? In such second action would not the "judgment in the prior action conclude the city? "If not, then on being beaten on a trial of that is- "sue the city could commence still another action "based on the allegation that the judgment had "been paid. Thus, as many different actions "as the city might allege grounds for claiming "the sale would be illegal could be maintained "seriatim, and no one judgment would con- "clude the city except as to the particular "ground upon which the city proceeded in each "particular case. And yet all these different "grounds would simply form evidence upon "which the original cause of action was based, "namely, the alleged illegality of the apprehend- "ed sale. They would form simply separate "facts upon which the cause of action might "rest." (*Cf. Highon Injunctions*, §39, *Bank of U. S. v. Schultz*, 3 Ohio, 6; *Breeze v. Haley*, 11 Col. 357; *Dowell* v. *Appellate*, 152 U. S. 327; *U. S. Trust Co.* v. *New Mexico*, 183 U. S. 535, 543; *In Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 216, 217; S. C. 175 U. S. 109; two suits were brought to obtain the same relief, one founded upon rights claimed under the Federal Constitution and the other upon independent grounds. It was held that a decree dismissing the latter bill was *res adjudicata* against the former. Mr. Justice Brewer said (186 U. S. 216, 217).

"The plaintiff failed to set up in the first suit "all its grounds of relief. Can it be permitted "in this to set up additional grounds and obtain "the very relief sought in the prior suit as well "as additional relief, the same in kind though "longer in duration? Will the law permit the "splitting up into separate suits of different

"grounds for the same relief? Will not the "judgment or decree in the first be held a final "adjudication of the rights of the parties?"

Robinson v. *Brown*, 166 N. Y. 159, 162: "If, "however, the plaintiff is a citizen, and a tax- "payer as well, and brings the action to re- "strain illegal acts and waste on the part of the "municipal officers, we see no reason why he "may not avail himself of any illegal acts, "whether they arise under the Labor Law or "any other statute, for the purpose of main- "taining his action. We do not think that the "allegations contained in this complaint consti- "tute separate causes of action."

U. S. vs. Union Pacific Railway Co., 160 U. S. 1, 51, 52; per Mr. Justice Harlan:

"In 1 Pom. Eq. Jur., Sec. 181, many adjudg- "ed cases are cited in support of the proposi- "tion that if the controversy contains any "equitable features, or requires any purely "equitable relief which would belong to the ex- "clusive jurisdiction, or involves any matter "pertaining to the concurrent jurisdiction, by "means of which a court of equity would ac- "quire, as it were, a partial cognizance of it, "the Court may go on to a complete adjudica- "tion, and may thus establish purely legal rights "and grant legal remedies which would other- "wise be beyond the scope of its authority."

It is well settled that, if there is a single ingredient of Federal jurisdiction in the case, relief may be given upon other grounds although the Federal question is decided adversely to the complainants.

Osborn vs. U. S. Bank, 9 Wheaton 738, 823, per Marshall, C. J. "We think then when a "question to which the judicial power of the

III. Jurisdiction of Questions not Federal.

"Union is extended by the Constitution forms "an ingredient of the original cause, it is in "the power of Congress to give the Circuit "Courts jurisdiction of that cause, although "other questions of fact or of law may be in- "volved in the case, that it involves questions "which do not at all depend on the Constitu- "tion of the United States; but when a ques- "tion to which the judicial power of the United "States is extended by the Constitution forms "an ingredient of the original cause, it is with- "in the power of Congress to give the Circuit "Courts jurisdiction of the cause, although to "other questions of fact or of law may be in- "volved in it. These propositions which are "too firmly established to admit of, or to require "further discussion, embrace the present case."

To the same effect are *Tennessee* v. *Davis*, 100 U. S. 257, 264; *Gold Washing & Water Co.* v. *Keyes*, 96 U. S., 199, 203, per Waite, C. J.: "The suit must, in part at least, arise out "or a controversy between the parties in regard "to the operation and effect of the Constitution "or laws upon the facts involved."

This is not a special rule of practice established for the sole benefit of banks and railway companies chartered by Congress, but it extends to all classes of cases.

New Orleans Waterworks v. *Louisanna Sugar Co.* 125 U. S. 18, 32, 33 per Gray, J.; speaking of *New Orleans Waterworks* v. *Rivers*, 115 U. S. 674; *St. Tammany Waterworks* v. *New Orleans Waterworks*, 120 U. S. 64:

"Both those cases were appeals from the "Circuit Court of United States upon which "this court was not restricted to the considera-

"tion of the Federal questions decided below "but had jurisdiction to determine the whole "case."

Omaha Horse Ry. Co. vs. *Cable Tramway Co.*, 32 Fed. R., 727, 729, per Mr. Justice Brewer:

"Both parties are citizens of Nebraska, and "the jurisdiction of this Court was invoked on "the ground that the State of Nebraska had "passed a law impairing the obligation of its "charter contract with the plaintiff. That ques- "tion having been decided against the plaintiff, "defendant insists that the case necessarily went "out of this Court; that the matter of damages "is a question purely under state laws, of which "this Court could not take jurisdiction. It "further insists that the prayer for relief in "plaintiff's bill, being for an injunction, is not "broad enough to include the assessment of "damages. I think the defendant is wrong in "both of these propositions. It is the settled "law of the Supreme Court that, when a case "is presented involving a Federal question, the "jurisdiction of the Court attaches to the whole "case, and is not limited to the mere decision of "that single Federal question, *Tennessee* vs. "*Davis*, 100 U. S., 257; *Railroad Co.* v. *Missis-* "*sippi*, 102 U. S., 135. In the last case Mr. "Justice Harlan, speaking for the Court, says "that it is settled law in that tribunal:

" 'That it is not sufficient to exclude the judi- " 'cial power of the United States for a particu- " 'lar case that it involves questions which do " 'not all depend on the constitution or laws of " 'the United States; but, wherein a question to " 'which the judicial power of the Union is ex-

" 'tended by the constitution forms an ingredi-
" 'ent in the original causes, it is within the
" 'power of Congress to give the Circuit courts
" 'jurisdiction of that case, although other ques-
" 'tions of fact or of law may be involved
" 'in it.' "

To the same effect are *Louisville Trust Co.* v. *Stone* (C. C. A.) 107 Fed. R. 305, 309, 310; *Nashville C. & St. T. Ry.* v. *Taylor*, 86 Fed. R. 168, 178, 188; *Pa. Mut. Life Ins. Co.* v. *Austin*, 168 U. S. 685, 695; *Scott* v. *Donald*, 165 U. S. 58, 71; *Owensburo* v. *Owensburo Waterworks*, (C. C. A.) 115 Fed. R. 318, 320.

IV.

It seems clear consequently, that so much of the bill as seeks relief grounded upon the fraud and mistake in the execution of the Rapid Transit Contract, the breaches of the same by the contractor, its invalidity because it creates a municipal indebtedness beyond the constitutional limitation and because of the consequent technical insolvency of the City of New York, is sufficient to require a decree in the complainant's favor; and for this reason also we are entitled to a reversal.

The Constitution of the State of New York (Art. VIII Section 10) provides:

"No county or city shall be allowed to be-
"come indebted for any purpose or in any man-
"ner to an amount which, including existing
"indebtedness, shall exceed ten per centum of
"the assessed valuation of the real estate of such

IV. Rapid Transit Contract Invalidated by Mistake, Insolvency Etc.

"county or city subject to taxation as it ap-
"peared by the assessment rolls of said county
"or city on the last assessment for state or
"county taxes prior to the incurring of such
"indebtedness; and all indebtedness in excess
"of such limitation, except such as may now
"exist shall be absolutely void."

The bill alleges:

"Prior to the commencement of the construc-
"tion of the underground railroad hereinafter
"described and prior to the attempt to incur on
"behalf of the City of New York, any indebt-
"edness for such construction, the indebtedness
"of the City of New York, exclusive of certi-
"ficates of indebtedness and revenue bonds is-
"sued in anticipation of the collection of taxes
"and exclusive of the issue of bonds to provide
"for a supply of water, exceeded ten per cent-
"um of the assessed value of the real estate of
"the City of New York subject to taxation; and
"the same is now the case. *The said City of*
"New York is insolvent." (p. 20, fol. 34.)

This Court cannot we presume, take judicial notice of any facts in conflict with these allegations. But should it do so, it will remember that for some time during the administration of Mayor Van Wyck public improvements in the City of New York were stopped because its debt limit had been exceeded, and the New York Sun and Times of January 29, 1903, contain a letter from the Coptroller Grout to the Board of Estimate admitting that the City of New York has exceeded its debt limit. In the opinion of the Appellate Division quoted in the bill upon the subject (pp. 21, 22, 26, fols. 35-41), a majority of that Court considered that a determination of this point was unnecessary when the consent to the construction of the

railroad was granted. (23 N. Y. App. Div., 472, 475, 486.) The question consequently was not then decided, nor was this question decided in *Sun Printing & Publishing Co. v. Mayor*, 152 N. Y., 257, S. C. 8 App. Div., 230, 256. Judge Barrett said:

> "It is to be presumed that public officers "will do their duty, and one of their first duties "is to respect and obey the Constitution. The "act is not invalid, because under it the com "missioners might possibly make a contract "which would transgress the provision in ques- "tion, in other words make an illegal contract "in disregard of their duty. The act itself "contemplates nothing of the kind. Nor does "it appear as a matter of fact that such a con- "tract will necessarily follow the due execu- "tion of the act."

The bill further alleges that the Rapid Transit Contract was obtained by fraud and undue influence; was executed under a material mistake by the city officials and that its material conditions have been broken by the contractor. (p. 29-31, fols. 47-51.)

The complainants are taxpayers and are consequently entitled to enjoin this waste of the city funds. (p. 14, fol. 23.)

Such relief is granted by the Federal Courts when sitting in equity independently of the state statutes.

> *Crampton vs. Zabriskie*, 101 U. S., 601, 609, per Mr. Justice Field.

It is well settled, that a bill is not multifarious which joins an insufficient with a good case for equitable relief and that the proper course for the defendants in such a case is to demur to so much of the bill as is insufficient.

> *Story's Eq. Pl.*, Sec. 283.
>
> *McCabe vs. Bellows*, 1 Allen, (Mass.), 269.

V. Inadequate Provision for Compensation.

Snavely vs. Harkrader, 29 Gratt (Va.), 112.
Brown vs. Guarantee Trust Co., 128 U. S., 403.

V.

The statute is also unconstitutional because of its failure to provide adequate compensation for the property of the plaintiffs and others which is taken by the defendant.

The Rapid Transit Act makes no provision for payment for the franchises owned by the complainant, nor for any franchise, which is not appurtenant to land the fee of which is taken under color of the statute (Rapid Transit Act, Sections 45-50; Bill in Equity VIII). As regards other property, it provides (Sec. 47) that on filing the oaths of the commissioners of appraisal:

> "On filing said oath * * * the said city "shall be and become seized and possessed in "fee or absolute ownership of all those parcels "of property, rights * * franchises, easements "or privileges, which are to be acquired, and "also shall become seized and possessed of all "the rights, terms, franchises, easements or "privileges appurtenant to any lots or parcels of "property indicated on the said maps or plans * "* * and the said Board for the said City "may immediately or at any time or times there-"after take possession or enter into the enjoy-"ment of the said property," &c.

There is no provision for any payment previous to the vesting of the title in the city, and its entry into possession of the property. All that is given to the property owners is the right to recover from the city such damages as may be awarded subsequently

by the commissioners of appraisal, or, in case of their failure to make such report within eighteen months, a suit for damages.

But the demurrer admits the following allegations in the bill.

> "*The said City of New York is insolvent.*
> "Any indebtedness and any claim against the "City of New York attempted to be created for "the benefit of property holders upon the route "of said underground railroad will be, and any "such indebtedness or claim heretofore sought "to be created on their behalf is and has been "null and void for the reason that the same is "and has been forbidden by the said article of "the Constitution of the State of New York "hereinbefore quoted," (p. 20, fol. 34, p. 11 of the bill;

p. 27 of this brief namely, Article VII, Sec. 10, which provides that all the indebtedness of a city or county in excess of ten per centum of the assessed value of the real estate therein subject to taxation "shall be absolutely void."

This question was not raised by the pleadings nor the evidence in *Sun Printing and Publishing Association vs. Mayor*, nor was it mentioned by the Court of Appeals in 152 N. Y., 257.

> See the opinion of *Barrett, J.*, (p. 8 App. Div. 254, quoted under Point 18).

That suit was brought before the consolidation of Greater New York, and then the city had not exceeded its debt limit.

> *Mills on Eminent Domain*, 2d Ed., p. 285, §126:
> "If the municipal corporation is so hampered "in its taxing power that the damages could "not be paid within a reasonable time, an in-"junction would be granted until security is "given to meet the damages."

V. Inadequate Provision for Compensation.

Randolph on Eminent Domain, §292, p. 268:

"There is not good security if the corporate "power of taxation is inadequate to supply "sufficient funds."

Keene vs. Bristol, 26 Pa. St., 46, 47, 48:

"Ordinarily the power of taxation which is "given to municipal corporations is adequate "security to the citizen for his property which "may be taken in opening streets for public use. "No other security need be required in the act "of the General Assembly giving the corporate "authorities power to open streets. Where, "however, it is clearly shown that the power "of taxation is inadequate within a reasonable "time to pay the damages likely to be occasion-"ed, we have no doubt that it is the right and "duty of this Court to interfere, when properly "called upon, and prevent the property from "being taken or the damages from being done "until adequate security is given. The present "is a case which requires such interference. The "power of taxation in the borough of Bristol "is so limited that the amount of damages like-"ly to be occasioned to the complainant's land "in all probability could not be paid out of the "public treasury of said borough within any "reasonable time."

Sage vs. City of Brooklyn, 89 N. Y., 189, 195, 196, per Andrews, C. J.:

"It is so axiomatic, that it is laid up as one "of the principles of government, that a pro-"vision for compensation is an indispensable "attendant upon the due and constitutional ex-"ercise of the power of depriving an individual "of his property under the right of eminent " domain (*Gardner v. Villiage of Newburgh*, "2 Johns. Ch., 168). The Courts in constru-

"ing the constitutional guaranty have departed "from what may seem its plain and natural "meaning, and have held that the payment for "property taken *in invitum* for public use need "not be concurrent with the taking, but that it "is sufficient if the law authorizing the taking "also provides a sure, sufficient and convenient "remedy by which the owner can subsequently "coerce payment by legal proceedings. If such "provision is not made, then, as was said by "Nelson, Ch. J., 'the law making the appro-" 'priation is no better than blank paper'" (*People ex rel. Utley v. Hayden*, 6 Hill, 359).

Bloodgood vs. Mohawk & Hudson R. R. Co., 18 Wend. (N. Y.), 9, 17, 18;

Kennedy vs. Indianapolis, 103 U. S., 599, 603;

Connecticut River R. R. Co., vs. Franklin Co. Commrs. 127 Mass., 50, 52, 54, 55, 56;

Baltimore & Susquehanna R. R. Co. vs. Nesbit, 10 How. (U. S.), 395, 398, 399;

Boston & Lowell R. R. Co. vs. Salem & Lowell R. R., 2 Gray (Mass.), 1, 37;

Haverhill Bridge Proprietors vs. Essex Co. Commrs., 103 Mass., 120, 124;

Brickett vs. Haverhill Aqueduct Co., 142 Mass., 394, 396;

VI.

The statute is void, because it is an attempt to use public funds for a private use, and consequently to take the property of the taxpayers without due process of law.

Had the legislature the power to authorize the City of New York to build and operate a railroad? This is a question of the utmost importance that sooner or

later, if the present progress of legislation in the direction of socialism continues, will come before this Court for adjudication. If any one of the other positions taken in this argument is correct, there is no need of its decision at the present time since the decree below should be reversed upon other grounds. If not, however, it is in the case, and the Court, if it affirms the decree, must finally approve all legislation of that character; which will change the whole nature of our government. The argument in its support is that, because the State may regulate the management of railroads, therefore, it may operate them. If this were so, still it would not justify the imposition of this burden upon the City of New York alone. But the argument, if admitted, proves too much, for it logically implies authority on the part of the State to engage in almost every kind of business: to build and manage hotels and tenement houses, theatres and grain elevators, to act as a plumber. It logically implies the power of the United States to build and operate all railroads that engage in interstate commerce—and what railroad does not? To engage in every sort of business that is affected by the functions of the national government; even as was demanded by the Democratic party in New York during the last campaign, to mine and sell coal.

Since we consider this case should be decided without passing upon this great question, we shall make no elaborate argument in writing upon the subject, but merely call attention of the Court to a few of the leading authorities. In view of these, *can this point be considered so frivolous as to be manifestly beyond the jurisdiction of the Courts of the United States?*

In case of a statute authorizing the expenditure of municipal funds for a private purpose, under the Fourteenth Amendment, the Federal Courts decide as to its validity independently of the state decisions.

VI. Public Money Expended for Private Use.

(*Loan Association vs. Topeka*, 20 Wall., 655; *Sutherland-Innes Co. v. Village of Evart*, 86 Fed. R., 597; *Cole v. Lagrange*, 19 Fed. R. 871.)

That such a use of public funds is unconstitutional, seems to have been the opinion of this Court in *Pleasant Township vs. Ætna Life Ins. Co.*, 138 U. S., 67.

It has been held that a State cannot build a grain elevator.

Rippe v. Becker, 56 Minnesota, 101, 111, 112, 117:

"The position of defendants' counsel really "amounts to this: That whenever those who "are engaged in any business which is affected "with a public interest, and hence the subject "of governmental regulation, do not furnish "the public proper and reasonable service, the "state may, as a means of regulating the busi-"ness, itself engage in it, and furnish the public "better service at reasonable rates, or, by means "of such state competition, compel others to "do so.

"The very statement of the proposition is "sufficient to show to what startling results it "necessarily leads. It needs no argument to "prove that if, in the exercise of the police pow-"er to regulate this business, the state itself "has a right to erect and operate one elevator "at Duluth, it has the power to erect and oper-"ate twenty, if necessary at the same point, and "also to erect and operate elevators at every "point in the state where there is grain to be "handled and stored.

"Railways are also, under this same police "power, the subjects of state regulation; and if "it should be deemed that they were not fur-

"nishing the public with proper service, or "charging unreasonable rates, it could with "equal propriety be claimed that it would be "a proper means of exercising the police power "of regulating the business for the state itself "to construct and operate competing railways. "The hack business, the pawnbrokers' business, "the manufacture and sale of intoxicating liq- "uors, and numerous other kinds of busi- "ness that might be named, are also "the subjects of State regulation, and, "if counsel's contention is correct, we do "not see why, as a means of 'regulating' these "kinds of business the state itself might not "engage in running hacks, pawnbrokers' shops, "building and operating distilleries and brewer- "ies, or even running saloons. But further il- "lustration cannot be necessary. The police "power of the state to regulate a business does "not include the power to engage in carrying "it on."

* * * * * * *

"It would leave the state, through its legis- "lature, at liberty, in every period of inflation "or excitement, to embark in any and every "other sort of enterprise, outside of its legiti- "mate governmental functions, which might be "deemed of public benefit. It would admit, not "only of building grain elevators, but also of "engaging in schemes of drainage, irrigation, "developing water powers, building public "gristmills, public creameries and cheese factor- "ies, establishing stock yards and packing "houses, and other like enterprises, almost with- "out limit."

In People v. Township Board of Salem, 20 Mich., 452, 478, per Cooley, J.:

VI. Public Money Expended for Private Use.

"The sovereign power of taxation is em-
"ployed in a great many cases where the power
"of eminent domain might be made more im-
"mediately efficient and available, if constitu-
"tional principles could suffer it to be resorted
"to; but each of these has its own peculiar and
"appropriate sphere, and the object which is
"public for the demand of the one is not neces-
"sarily of a character to permit the exercise of
"the other."

Sun Publishing Assn. v. Mayor, 8 App. Div., 230, 261, 263, per Ingraham, J.:

"The intent of this act is apparent. Under
"its provisions a board of Rapid Transit Rail-
"road Commissioners, appointed by the Legis-
"lature are authorized to construct in each city
"of the state containing more than 1,000,000
"inhabitants, a railroad, upon a majority of the
"electors of such city voting in favor of such
"construction, and with the consent of certain
"local authorities. That the vote and the con-
"sent of certain local authorities having been
"once given, the nature of the railroad, its ex-
"tent, its cost, the terms of the contract under
"which it shall be constructed, and the parti-
"cular contractors who shall be employed, are
"to be determined by the said board, over
"whom the municipal authorities have no con-
"trol. As part of the contract for construction,
"the board must make a lease of the railway,
"when completed, to the contractor for a per-
"iod of at least thirty-five years. As to the
"terms of that lease and the rent to be paid, the
"city acquire the possession, use, occpation of,
"ance of that lease, by no possibility can the
"city acquire the possesion, use, occupation of,

"or any power or authority over the road. In "case the contractor shall fail to pay the rent "or fulfill the conditions of the contract, it is "the Board of Rapid Transit Commissioners "who take possession of the road, and either "operate it themselves or lease it to others to "operate, with no power in the city to regu- "late the conditions or terms, or rent to be re- "ceived. In such case the power of the Board "of Rapid Transit is unlimited, as in case of "such failure on behalf of the contractors, the "Rapid Transit Commissioners may either "operate the road or lease it to others for such "price as they may fix in their discretion. And "by the express terms of the statute this "contract may provide for renewal or "renewals of such lease, so that the "lease may be a substantial perpetuity, "with no right of the city to obtain any "control over, or possession of the property, or "any right of any kind over it except to receive "rent that the Rapid Transit Commissioners "may deem best to impose upon the contractors. "No officer of the city, nor the municipal cor- "poration itself, under such a lease would ever "acquire the possession or control of the prop- "erty; nor would the city have the right to have "any voice in fixing the rate of fare to be "charged. That also is to be provided for in "the contract at such an amount as the Rapid "Transit Commissioners shall fix. After that "contract is made, neither the city nor the state "could alter the rates of fare which these Rapid "Transit Commissioners shall fix as the fare to "be charged by such contractors. All that the "city can do and what the city is bound to do "is, to pay the sum fixed by the Rapid Transit

"Commissioners as the price to be paid to its "contractor that they may select regardless of "the amount of his bid, and all such further "sums as shall be necessary to acquire such "property as the Rapid Transit Commission- "ers shall certify to be necessary for the proper "construction, operation or maintenance of the "road and such further sums as will be sufficient "to pay all damages sustained by any one in "consequence of such construction, operation "and maintenance of the road. The statute it- "self, while contemplating the payment of many "millions of dollars by the city, provides no "safeguard for the prevention of claims by the "contractors or others for payments outside of "the contract, but in the broadest way imposes "upon the city liability for damages that the "construction or operation will entail, with no "provision for the re-payment of such damages "by any one, leaving the city thus absolutely at "the mercy of the contractors or others who "sustain damages by reason of the construc- "tion or operation of the railroad. And even "this is not all, for by the provisions of the stat- "ute, the Rapid Transit Commissioners, with "the consent of the contractor and his surety, "may modify the contract in any respect, and "thus, without the consent of the city, impose "additional burdens upon it. It is only neces- "sary to read the remarks of Peckham, J., in "delivering the opinion of the Court in *O'Brien "v. The Mayor,* (139 N. Y., 543) to appreci- "ate the possible effect of this omission upon "the City of New York."

(*Ibid.*, pp. 265, 266): "Can it be a city pur- "pose to acquire property which is to be used

"by an individual or corporation for profit, "over which neither the city nor its citizens "can have control, the use of which they can- "not regulate, and where they can have no "authority to impose the terms upon which it "is to be used by others? Can it be a city pur- "pose to invest $55,000,000 in property which "by a very possible contingency, may be oper- "ated or leased so that no return at all shall be "paid to the city for its use, the city or its "citizens being powerless to obtain possession "of or in any way control or use it, and from "which by means of a contract uncontrolled "by the municipal corporation, the person in "possession can exclude every one of the citi- "zens of the city except upon payment to him "of a fee, the amount of which neither the city "nor its citizens can control? * * * *

"Does it avoid the prohibition to say that "the legal title vests in the City of New York "when the beneficial use and profits of the prop- "erty are vested in another perpetually? Un- "der this contract who is to get the benefit if "this road becomes a profitable undertaking, "where large profits will be made by the oper- "ation of the road? Not the city. It never can "receive more than the rent reserved to it by "the contract between the Rapid Transit Com- "missioners and the contractors. Who is to "bear the burden if the undertaking prove a "failure? Clearly the city, except so far as "it is protected by the giving of the bond, the "amount of which is entirely within the dis- "cretion of the Rapid Transit Commissioners. "And all through this act it is clear that the

"Legislature was not thinking of the welfare of "the city, was not thinking of this as a city pur- "pose or city use."

* * * * * * *

(p. 272): "The construction and operation "of a railroad is not the only business that has "been recognized by the law as being of pub- "lic interest, or as having more or less a pub- "lic character. Thus, the establishment of an "elevator for the purpose of loading vessels "with grain has been so considered (*People v.* "*Budd*, 117 N. Y., 1). Also the operation and "maintenance of a theatre. (See *People v.* "*King*, 110 N. Y., 418.) And the power of "the Legislature to control the keepers of hotels "or inns has been frequently applied, on the "ground that this use of their property was "'effected, with a public interest;' and if the pub- "lic character of the business, or use to which "the property is put controls, I can see no rea- "son why the City of New York should not be "compelled to erect hotels to be used for the "accommodation of guests, theatres to be used "for the amusement of its citizens, elevators "to be used by the railroads for loading grain "from their cars, stage or cab lines for the car- "rying of passengers or for almost any use or "purpose which is required for the convenience "or amusement of the people."

(*Ibid. Per Rumsey, J.*, pp. 286, 287): "This "power must stand, if at all, upon the "broad proposition that it is within the prop- "er scope of the duties of a municipal corpor- "ation to do within the limits of the city what- "ever may add to the convenience of any large "portions of the citizens in the transaction of

"their business, or which will to any consider-
"able extent increase the value of any portion
"of their property. Indeed as I understand
"the opinion of the majority of the Court, this
"is said to be a city purpose solely upon the
"ground that it tends to the convenience and
"comfort of a large portion of the inhabitants,
"in the transaction of their business, and it be-
"comes important because, at present, private
"persons cannot be induced to undertake it.
"But the fact that the thing which ordinarily
"should be intrusted to private enterprise and
"which has heretofore always been so intrust-
"ed may, to some extent, partake of a public
"character because it promotes the convenience
"or prosperity of a municipal corporation, has
"not been supposed to invest that enterprise
"with such a public nature as to authorize muni-
cipal corporations to undertake it. (*Weismer
"v. Village of Douglas*, 64 N. Y., 91; *Hay v.
"Cohoes Co.*, 3 Barb., 42; *Memphis Frt. Co.
"v. Memphis*, 4 Cold. (Tenn.), 419; *Gardner
"v. Newburg*, 2 Johns. Ch., 161; *Matter of N.
"F. & W. R. Co.*, 108 N. Y., 375.) These
"authorities are a complete answer, as it seems
"to me, to the proposition upon which the con-
"stitutionality of this act is made to stand.

"As is said by Judge Dillon: 'To clothe
" 'them (these corporations) with power to ac-
" 'complish purpose which can better be left to
" 'private enterprise is unwise. Their chief
" 'function should be to regulate and govern.
" 'To invest them with power of individuals
" 'or private corporations for objects not per-
" 'taining to municipal rule is to pervert the
" 'institution from its legitimate ends and to

"'require of it duties it is not adapted to sat-
"'isfactorily execute.' (*Dillon on Mun. Corp.*,
"§12.)"

"It is conceded that this act is a departure
"from, and an advance beyond all previous
"legislation, in that it gives to the cities men-
"tioned in it powers which they have not here-
"tofore exercised. It seems to me, as I have
"endeavored to show, that this power is not
"only outside the ordinary range in which mu-
"nicipal corporations have thus far acted, but
"it extends their powers further than can be
"justified by any fair construction of our Con-
"stitution, and certainly further than ever has
"been done before. This whole legislation is
"fraught, as I believe, with danger to the com-
"monwealth, because the necessary effect of it
"cannot be otherwise than to draw within the
"power of the legislature, and to impose upon
"the state and city authorities, the manage-
"ment and control of every agency which can
"in any way tend to the convenience of the peo-
"ple, or which can be supposed in any way to
"advance their prosperity."

See *In re Municipal Fuel Plants (Mass.* 1903) 66 N. E. Rep. 24.

VII.

The act is further void because it takes the property of the complainants without due process of law; since it subjects them to the payment of taxes for the expenses of officers not elected by the people, nor appointed by representatives of the people, and makes them subject to the authorty of such officers who are authorized to regulate the complainants' business, to control and lease a railroad which is the city's property and to spend the municipal funds.

The Rapid Transit Act (§ 1 quoted, *supra*, p. 9) appointed as municipal officers six persons, whom the act named, besides the Mayor and Comptroller of the city, and the President of the Chamber of Commerce, who is an official of a private corporation. If, as the defendants claim, this is a general, and not a local law, the statute appointed six persons residents of the City of New York municipal officers of other cities—one of the most flagrant instances of a denial of the right of local self-government that can be found in the statute books. The act, moreover, provided that vacancies in the board "shall be filled by a majority vote "of the remaining members of said board." Three of the defendants have been elected by the survivors of the original board to fill vacancies therein. "Four "members of the board shall constitute a quorum for "the transaction of business." (§ 3.)

> "§10. *The board of estimate and apportion-*
> "*ment* or other board or public body on which
> "is imposed the duty, and in which is vested the
> "power, of making appropriations of public
> "moneys for the purposes of the city govern-

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VII. Composition of Board Unconstitutional.

"ment in any city in which it is proposed to "construct railway or railways *shall, from time "to time, on requisition duly made by the "Board of Rapid Transit Railroad Commis- "sioners, appropriate such sum or sums of "money as may be requisite and necessary to "properly enable it to do and perform, or cause "to be done and performed, the duties herein "prescribed, and to provide for the compensa- "tions of such commissioners,* and such appro- "priation shall be made forthwith upon presen- "tation of a requisition from the Board of Rapid "Transit Railroad Commissioners, which shall "state the purposes for which such moneys are "required by the said board. In case the said "Board of Estimate and Apportionment or such "other board or public body fail to appropriate "such amount as the Board of Rapid Transit "Railroad Commissioners deem requisite and "necessary the said Board of Rapid Transit "Commissioners may apply to the General "Term of the Supreme Court, in the department "in which the railway is to be or has been con- "structed, on notice to the Board of Estimate "and Apportionment, or such other board or "public body aforesaid, to determine what "amount shall be appropriated for the purposes "required by this section, and the decision of "the said general term shall be final and con- "clusive; and no city shall be liable for any in- "debtedness incurred by said board of rapid "transit railroad commissioners in excess of "such appropriation or appropriations. It shall "be the duty of the auditor and controller of "any such city, after such appropriations shall "have been made, to audit and pay the proper

"expenditures and compensation of said com-
"missioners upon vouchers therefor to be fur-
"nished by said commissioners."

The Legislature has thus created a close corporation, with power to dispose of the municipal property, to regulate the business of corporations, and to incur expenses which must be met by taxation, in all the cities of the State that possess more than a million inhabitants, with no power on the part of the people of those cities to control the board. All vacancies are to be filled by the choice of the board, and in a short time a majority thereof will consist of members thus chosen. This is forbidden by the Constitution of the State of New York (Art. X., Sec., 2). Nor is such a method of election by a board of its own membership "a Republican Form of Government" such as the United States guarantees to the State of New York, (Constitution, Art. IV, Sec. 4). And it is not due process of law (XIV Amendment).

The character of the persons named cannot affect the constitutionality of the act. Suppose that the New York State Legislature should enact that certain specified persons together with the Mayor and the Controller of New York City should constitute a police board or other municipal commission with power to spend the municipal funds and to fill vacancies in their number, and that the persons selected were the Sachems of Tammany Hall or the executive committee of the Republican organization in such city; would this court hold such a statute to be valid? Even if it had been sustained by a State court divided upon party lines? But the New York Court of Appeals has not yet had this defect in the Statute brought to its attention. When the *Sun* case was brought, no vacancies in the Board had been filled. If the legislature may allow a close corporation of this character to spend part of the city's funds, it may substitute such a

board for the present Board of Estimate and thus authorize all the city's money to be appropriated in this manner. It may transfer the control of the police, the firemen, the schools and all other municipal departments to the same or to a similar Board. *Is this point too frivolous as to be manifestly beyond the jurisdiction of the Federal Courts?*

In *Fox vs. Mohawk and Hudson River Humane Society*, 165 N. Y. 517, 525, the Court of Appeals held that a similar provision in a statute was unconstitutional, speaking through Judge Cullen: "That the agents or "officers of the corporation are appointed such "by the corporators and that, if such agents "are invested by virtue of their agency alone "with the power of public officers, it is in sub-"stance devolving the choice of public officers "on a few of the citizens, and possibly persons "not citizens, while, under the Constitution, all "public officers must be elected or appointed by "other public authorities, and thus trace their "title to power and authority either immediately "or mediately back to the people. (see *Ames vs.* "*Port Huron, Etc., Co.*, 11 Mich., 139; *State* "*vs Kennon*, 7 Ohio. St. 547; State *ex rel.* "*Clark vs. Stanley*, 66 N. Carolina, 59)."

In *Rathbone vs. Wirth*, 6 App. Div., 277, "308, per Herrick, J. (Affd. 150 N. Y., 459), *Held*, that a bill is unconstitutional which is "an infringement upon the right of the majority "to select their own officers, either immediate-"ly by election, or by their accredited agents, "and is destructive of the principle of local "self-government."

S. C., 6 App. Div. 285, 286: "Suppose the "legislature should see fit to create a new county

"office, and should provide that, at the general "election for the election of State officers, "the person for whom the next highest "number of ballots should be cast for "such office, should thereafter dicharge the "duties thereof. A new office is created "which the legislature has a right to create, and "also to determine the method of filling it. "There is nowhere any express prohibition "against legislation of that character in the "constitution, and yet what man will say that "an act of that kind would stand for a moment, "not because it is in conflict with any express "provision of the constitution, but because it "is repugnant to its whole spirit and intent."

State ex rel White v. Barker, (Ind. Sup. Ct., 1902), 89 N. W. Rep. 204, 208; "Having then, a proprietary and private "interest in its waterworks system, grant- "ed to it by the legislature, or incident "to its power to acquire and hold prop- "erty, the question recurs, may the management "and control of this property be taken out of "its hands by the legislature, and invested in "trustees appointed by the district court; especi- "ally where, as in this case, the trustees so ap- "pointed are in no respect responsible to the "appointing power, and are not required to "make reports thereto? We think not. If the "city were a mere private corporation, it would "need no argument to show that the legislature "could not take the management of its prop- "erty out of the hands of its officers and di- "rectors, and place it in the custody and control "of officials, even if they be stockholders, select- "ed by persons who had no interest in the corpo-

"ate entity, and who were in no manner re-
"sponsible to those interested in the welfare of
"the organization. Such divesture of prop-
"erty, or, what is the same thing, of its manage-
"ment and control, would be unconstitutional
"and void. The same rules have been applied
"to property held by a municipal corporation
"in its private and proprietary capacity. See
"case heretofore cited, and *Dill. Mun. Corp.*
"(4th Ed.) Sects. 68, 68a, 69. *Orr v. Bracken*
"*Co.*, 81 Ky. 593; *Small v. Inhabitants of Dan-*
"*ville*, 51 Me. 359; *Western College v. City of*
"*Cleveland*, 12 Ohio St. 375; *Oliver v. City of*
"*Worcester*, 102 Mass. 489, 3 Am. Rep. 485;
"*DeVoss v. City of Richmond*, 18 Grat. 338,
"98 Am. Dec. 647; *Niles Waterworks v. City*
"*of Niles*, 59 Mich. 311, 26 N. W. 525; *Com-*
"*missioners v. Duckett*, 20 Md. 468; and cases
"heretofore cited. This view appears to us to
"be based on the soundest of reasons, and to be
"supported by the weight of authority."
(*People v. Hurlburt*, 24 Mich. 44).

State ex rel. Geake v. Fox (Ind. Sup. Ct. 1902, 63 N. E. 19); *Held* that a statute authorizing the appointment by the governor of a board to control the municipal fire department, is an unconstitutional interference with the right of the municipality to self-government.

VIII.

The filing of maps and profiles of their routes in the offices of the register and county clerk gave to the Central Tunnel Railway Company, and its successors, these complainants, a vested and exclusive right to construct and operate a railroad on the lines which they had adopted. The State contracted that no one else should build a railroad there.

In *Rochester, H. & L. R. R. Co. vs. N. Y., L. E. & W. R. R. Co.*, 44 Hun, 206, 210, the General Term of the Supreme Court said, speaking through Barker, J.: "Under the gen-"eral railroad act, when a corporation has been "organized in compliance with the conditions "of the statute and has made a map and profile "of the route intended to be adopted by the "company, duly certified and filed as required "by the twenty-second section, it has acquired "*a vested and exclusive right to build, construct "and operate a railroad on the line which it has "adopted.*"

This decision and opinion were affirmed and approved by the New York Court of Appeals.

In *Rochester, H. & L. R. R. Co. vs. The N. Y., L. E. & W. R. R. Co.*, 110 N. Y., 128, 132,-134, when that Court said, speaking through Judge Gray:

"We think the General Term were right in "the view they took of the matter. The plain-"tiff, by its organization under the general rail-"road act of 1850, became possessed of the "franchise to construct and operate a railroad "between the terminal points named in its

"articles, over such a line of route as it should "elect. When the initial steps pointed out in "the twenty-second section of the act had been "taken, there only remained for the plaintiff to "acquire, through purchase or through proceed-"ings *in invitum*, the right of way over the "lands through which the line of route had been "surveyed. By the terms of that section, every "company formed under the act, before con-"structing any part of its road through any "county, must make and file a map and profile "of the route intended to be adopted, and must "give a written notice to all occupants of the "land affected of the time and place of filing, "and that the route designated passes over the "land of such occupants.

"Clearly, there is involved in these provisions "the intention of the legislature that, after the "initial proceedings have been taken, which the "statute points out as the first action of the new "corporation, the lands over which the com-"pany's route is located shall be subjected to the "right of the company thereafter to construct "thereon. The legislative scheme contemplates "the determination of the line of route to be in "the discretion of the company, to be exercised "in the mode prescribed by law, and its exer-"cise, when in good faith and within the limits "of its corporate powers, is only reviewable by "the court in the case of an application by an "occupant or owner of lands feeling aggrieved "by the proposed location of the road. This "right to locate its line of road at its election "is delegated to the corporation by the sovereign "power; as is the right subsequently to ac-"quire, *in invitum* the right of way from the "landowner and any land needed for the opera-

"tion of its road. In this sovereign power is "the source of the franchise which the corpora- "tion possesses to construct and operate a rail- "road, and its grant is for public, and not for "private, purposes. Public considerations enter "into the grant of the franchise, and public "policy favors the enterprise for the public con- "venience and use. When, therefore, a corpora- "tion has made and filed a map and survey of "the line of route it intends to adopt for the con- "struction of its road, and has given the re- "quired notice to all persons affected by such "construction, and no change of route is made, "as the result of any proceeding instituted by "any landowner or occupant, in our judgment "it has acquired the right to construct and oper- "ate a railroad upon such line; exclusive in that "respect as to all other railroad corporations, "and free from the interference of any party. "*By its proceeding it has impressed upon the "lands a lien in favor of its right to construct, "which ripens into title through purchase or "condemnation proceedings.* We could not "hold otherwise without introducing confusion "in the execution of such corporate projects, "and without violating the obvious intention "of the legislature. The plaintiff's franchises "were invaded and its enjoyment of the statu- "tory privileges disturbed by the action of the "defendant company in so building tracks upon "plaintiff's line of route as to obstruct and in- "terfere with its proposed construction. The "remedy by injunction was clearly available to "the plaintiff on principles of equity jurispru- "dence."

That such a right is a contract right and a right of property, which are protected by the Constitution of

the United States, is held by the same Court in *People vs. O'Brien*, 111 N. Y., 1, and other cases.

In *Suburban Rapid Transit Co. vs. Mayor*, 128 N. Y., 510, 519, the Court of Appeals said, speaking through Judge Gray: "When the "route or routes were located upon which the "roalroad of the new corporation should be con- "structed, what other legal effect could follow "except a subjection of the land affected to this "species of public use as through the exercise "of paramount right? The subsequent pur- "chase or condemnation of the title to the lands "in the course of the railroad construction was "merely incidental, and was necessary in order "to compensate property owners for the land "taken, and to effect a transfer of the legal title. "The right which the plaintiff acquired to con- "struct and operate a railroad upon the route "described in its articles of association lacked "nothing for its efficacy or completeness. It "had become an obligation, and was one of the "unalterable conditions and a fixed public "feature of the corporate existence. * * * *How "can a franchise so conferred by the legislature "be deemed inchoate and defeasible? Is not "its possession an element of the security upon "which capital has been subscribed and loans "have been made to the Company?* * * * I think "we must conclude that the statutory proceeding "which resulted in the organization of the plain- "tiff's corporation had the effect of vesting in "it the absolute and exclusive franchise to build "upon the route located for it, and to the use "of which the lands were devoted through the "exercise of the paramount right of the sover- "eign power, which franchise was unimpaired "with respect to the right to take and use the

"land in question by the fact that the work of "actual construction had not reached it at the "time the legislature passed the act for the new "parks."

That priority in filing the map gives a priority in right of way is held in: *Morris, & E. R. R. Co. vs. Blair,* 9 N. J. Eq., 635; *A. T. & S. F. R. R. Co., vs. Mecklin,* 23 Kansas, 167, 170; *Boston and Maine R. R. vs. Lowell and Lawrence R. R. Co.,* 124 Mass., 368, per Gray, C. J.; and the Congressional Land Grant Cases: *United States vs. Oregon and California R. R. Co.,* 176 U. S., 28, 50; *Northern Pacific R. R. Co. vs. Sanders,* 166 U. S., 620; *Sioux City R. R. Co. vs. Chicago R. R. Co.,* 27 Fed. R., 770; *St. Paul & Pac. R. R. Co. vs. Northern Pac. R. R. Co.,* 139 U. S., 1, 18; *Van Wyck vs. Knevals,* 106 U. S., 360, 366; *Buttz vs. N. Pac. R. R. Co.,* 119 U. S., 55, 71, 72; *Kansas Pac. Ry. Co. vs. Dunmeyer,* 113 U. S., 629; *Walden vs. Knevals,* 114 U. S. 373.

People vs. Adirondack Co., 160 N. Y. 225; *Adirondack Railway Co. vs. New York,* 176 U. S. 335; does not overrule the former cases, nor lay down different rules.

Before the Adirondack Railway Company had filed a map and profile specifying the route over the property in question, the Constitution of the State had ordained (Art. VII., Section 7):

"The lands of the State, now owned or here- "after acquired, constituting the forest preserve "as now fixed by law, shall be forever kept as "wild forest lands. They shall not be leased, "sold or exchanged, or be taken by any corpora- "tion, public or private, nor shall the timber "thereon be sold, removed or destroyed."

The map was not filed by the railway company until September 18th, 1897, and the notices were served September 23, 1897 (176 U. S., 345). Previously, May 15, 1895, an act was passed providing for the ac-

quisition of this property by the Forest Preserve Board for the Adirondack Park. *The act of April 8th, 1897* (Ch. 220, Vol. 1, p. 93), which was also *passed before the map was filed*, "to provide for the acquisition of land in the territory embraced in the Adirondack Park, and making an appropriation therefor," provided specific regulations for the manner in which the board should acquire and pay for the land in question.

On August 6th, 1897, after negotiations with the owners, the Forest Preserve had contracted for the purchase of the same at a specified price, thus acquiring an equitable right thereto; and on August 15th possession of the land was taken by the Board (160 N. Y., 232-233). The railway company did not file its map and profile until September 18th, 1897, after these proceedings had been taken. Moreover,

> "the map was filed in 1897, when the defend-
> "ant had nine hundred and eighty-five years of
> "corporate existence before it, and it had then
> "been relieved by the action of the Railway
> "Commissioners from the obligation of extend-
> "ing its road. If a lien upon the real estate thus
> "covered by the map, it was good for the length
> "of the period named and was virtually a per-
> "petual incumbrance placed upon property
> "which impaired its value by hindering as well
> "as preventing improvements, and yet *the hold-*
> *"er of the lien was neither obliged to do any-*
> *"thing by virtue thereof for the benefit of the*
> *"public nor even to compensate the owner. No*
> "action had been taken or *money expended* to
> "extend the road when the State acted" (160 N. Y. 242).

We have spent more than $100,000 (Bill, p. 3, fol. 11; p. 16, fol. 61; p. 17, fol. 67); *and we can be compelled by mandamus to build and operate* our railroad. road. There was *in the Adirondack case no rec-*

iprocity between the State and the railway company; no consideration on the part of the latter, and, hence, no contract between it and the State. Under these circumstances, it was held that, as against the State, which had previously manifested its intention to appropriate the property, the railroad acquired no vested right to the lands specified on its map. Judge Gray said:

> "The act of 1897, under which the forest "preserve board acted, was constitutional, and "the state acquired the land in question by the "exercise of a power which superseded any lien "the defendant might have obtained by the "initiatory steps taken" (160 N. Y. 248).

When the act of 1897 was passed, the map had not been filed. Judge Vann said:

> "The effect of the map when filed was to give "warning to other railroads that a certain route "had been preempted by the defendant. It "established no right against the owner, because "the Constitution forbids it; it established none "against the state, because its power is "paramount; but, *as against all other railroad "companies and as against all other creatures "of the state empowered to use the right of "eminent domain, it gave the exclusive right to "occupy that particular strip for railroad purposes until the legislature authorized it to be "devoted to some other public use.* The general "language used in certain cases relied upon by "the defendant should be read in the light of the "facts then before the Court (*Rochester H. "& L. R. R. vs. N. Y., L. E. & W. R. R.*, 110 "N. Y., 128; *Suburban Rapid Transit vs. Mayor, Etc.*, 128 N. Y., 510). These cases simply "involve controversies between the corporations "created by the state as to a located line, and

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> "the legislation necessary to enable one corpora-
> "tion to condemn land previously condemned
> "by another and the like. The state was not a
> "party to any of them, and the only question in-
> "volved was as to which corporation was ahead.
> "The so-called lien was simply an exclusive
> "right of one of two contending railroad corpor-
> "ations as against the other to build a road on a
> "certain piece of land or of a railroad corpora-
> "tion to hold land already condemned for public
> "use as against a city seeking to condemn it for
> "another public use without special authority
> "from the legislature. The general effect of
> "filing a map was not involved, but the par-
> "ticular effect as between two corporations each
> "trying to get the same land" (160 N. Y., 246, 247). The Court of Appeals further held "the
> "command of the constitution that the lands of
> "the Forest Preserve cannot be 'taken by any
> " 'corporation, public or private,' shows an un-
> "mistakable intention to keep railroads out of
> "the Adirondack Park" (160 N. Y., p. 248).

This Court, in affirming this judgment, quoted with approval the language of the Court of Appeals to the effect that the filing of a map gave the railway company an exclusive right as against every railway company and other creatures of the State empowered to use the right of eminent domain (176 U. S., 346); and further said:

> "In this case, use for the park was in itself
> "inconsistent with the use for railroad purposes,
> "and the legislation and the constitution alike
> "forbade this company to acquire for its
> "use any portion of that which the State
> "had taken for its own exclusive and designated
> "purposes" (176 U. S., 349).

There is no foundation for the distinction claimed by the learned counsel for the defendants between

country railways and city railways so far as concerns the acquisition of a prior and exclusive right by a corporation which first files its articles of association, map and profile. On the contrary, the *Suburban Rapid Transit* case, 128 N. Y., 510, recognizes that the doctrine applies to street railways.

The principle established by the authorities already quoted is, that the company first incorporated for the purpose of constructing a railroad between specified points as soon as it has filed its articles of incorporation in the office of the Secretary of the State, made its survey and filed a map and profile of its route in the County Clerk's office, all of which proceedings necessitate the expenditure of a considerable sum of money, thereby acquires a prior and exclusive right to construct a railroad over the route thus specified, which is paramount to that of any other person.

> "By its proceedings it has impressed upon "the lands a lien in favor of its right to con- "struct, which ripens into title through pur- "chase or condemnation proceedings" (110 N. Y., 133).

It acquires no right then as against the land owners, and no easement upon the lands as against them by such a proceeding. Either in the country or the city his title to his land remains absolutely in him until parted with by his own consent or until he has been divested of it by condemnation proceedings, which can only be instituted after an attempt to obtain his consent has been made and failed. The same doctrine has been applied to the rights of persons interested in the city streets, namely, the public authorities, who represent the municipality and the abutting owners. No railroad can be constructed in such a street until after the consent of these persons has been obtained or else

by the institution of legal proceedings the Appellate Division has divested the abutters of their right to prevent the construction of a street railroad. In such a case, where the city, as in New York, owns the fee of the street, no condemnation proceedings are then necessary. There is, consequently, no reason why the exclusive franchise, as against all other persons who wish to construct railroads, should not exist in the case of a street railroad or city railroad as in that of a country railroad. In each case subsequent proceedings are necessary to ripen the lien into title. No case can be cited which makes such a distinction between them. No distinction exists (*Surburban Rapid Transit Co. vs. Mayor,* 128 N. Y., 510).

IX.

It is well settled that such a franchise is property and a contract with the State, which cannot be taken, and the obligation of which cannot be impaired without a violation of the constitution of the United States.

City Railway Company vs. Citizen's Street R. R. Co., 166 U. S., 557: *People vs. O'Brien* 111 N. Y., 1.

In *Chesapeake & Ohio Canal Co. vs. Baltimore & O. R. R. Co.*, 4 G. & J. (Md.), 1, 49, 57, 144, 145, 169, *thirty-nine years had passed since the grant of the franchise without any attempt to use the same*:

> "This franchise, this corporation right, to "select and acquire land for the authorized pur- "poses of a corporation, is property; it is an in- "corporeal hereditament, not a legal title to the "land itself, not a *mere capacity* or *faculty* to ac- "quire and hold land, such as every individual "possesses; but, in addition to such capacity, it

"is a right or privilege, a portion of the eminent "domain vested in the corporation, to acquire "the legal title to land subjected by the grant "to its will, and thus to convert the incorporeal "into a corporeal hereditament, and after the "franchise to choose and condemn land for any "particular public purpose, that portion of the "eminent domain granted and subsisting in one "corporation cannot be bestowed upon another "to the former grant, nor can any other legally "acquire any such right of way or title to the "land over which the franchise extends as will "hinder the former corporation in the exercise "and enjoyment of its franchise."

In *Pearsall vs. Great Railway Company*, 161 U. S., 646; the only power withdrawn from the corporation by an amendment of its charter was that to consolidate with another railway company. This had no pecuniary value, had never been exercised nor contemplated before the amendment; and upon the faith of this no money had been expended. This is far different from an exclusive franchise to construct a railway upon a specified route, upon the surveys of which and in preparation for such construction more than $100,000 has been expended and which has great pecuniary value so that mortgage bonds upon its security could be sold in the market. The latter was a vested right.

Matter of Thirty Fourth Street R. R. Co., (102 N. Y. 343, 351) per Andrews, J.: "The "franchise acquired by a company organ- "ized under its provisions, is perfect ac- "cording to the nature of the franchise "intended to be given, from the moment "the corporation comes into existence. The "legislative grant was conditional and not abso- "lute. * * * *The company upon consent be- "ing refused, is not deprived of its franchise.* A

"failure to obtain such consent simply puts in "abeyance its right to proceed with the con- "struction of the proposed road until the ob- "struction is removed, and this precise situation "was within the contemplation of the legislature "when the act was passed."

In the matter of the application of the Rochester Electric Railway (123 N. Y., 351, 357, 362) no maps of the route had been filed; no notice given to the land owners, it was merely *held* that the railroad company could not maintain a proceeding for the condemnation of land in a highway until it had done this and had obtained the consent of the local authorities. The Court said that the right to the exercise of this franchise was still inchoate until such consent had been obtained. Similarly, in the case of ordinary long-distance railroads, the construction cannot be begun until the consent of the land owners has been acquired, either voluntarily or by condemnation proceedings, but the exclusive franchise still exists, and has been sustained by the Courts in the cases previously cited.

The constitution protects rights which are contingent as well as those that are vested in present provision and enjoyment. It protects contingent remainders.

Dunn vs. Sargent, 101 Mass., 336; *Appeal of Benson*, 22 Pa. St., 164; *White vs. White*, 5 Barb., 474; s. c., 4 How. Pr., 102; *Holmes vs. Holmes*, 4 Barb., 295; the unexercised right to build on land (*Forster vs. Scott*, 136 N. Y. 577, 585), the right to prospective profits under a contract with the State which has not been performed (*Danolds vs. New York*, 89 N. Y. 37, 45); a statutory right to supply water to a city which has never been exercised (*Long Island Water Supply Co., vs. Brooklyn*, 166 U. S. 685); the right to the franchise of being a corporation (*West River Bridge vs. Dix.*, 6 Howard 507; *Richmond vs. Railroad Co.*, 13

IX. Franchise is Property and Contract with the State.

How. 71); a right of way (*Troy & Boston R. R. Co. vs. Northern Turnpike Co.*, 16 Barb. 100); the right to operate a street railway (*People vs. O'Brien*, 111 N. Y. 1); the right to plant an oyster bed (*Huffmire vs. Brooklyn*, 162 N. Y. 584); the husband's right to his wife's choses in action in case he survives her, although such an estate consists of personal property which he has not reduced to possession before the passage of the statute or during the life of his wife, (*Westervelt vs. Gregg*, 12 N. Y. 202; *White vs. White*, 5 Barb. 474); a statutory contract with the United States; this the United States cannot repeal by an act of Congress, although a right to amend or repeal the charter of the corporation has been expressly reserved (*U. S. vs. Central Pac. R. R. Co.*, 118 U. S. 235, 238); a contract with a State for printing or otherwise, although it has not been performed; (*State vs. Banker*, 4 Kansas, 324; *Jones vs. Hobes*, 63 Tenn. 113; *Danolds vs. New York*, 89 N. Y. 36, 45).

Cooley on Constitutional Limitations, 6th Ed., p. 336:

> "Respecting the power to amend or repeal "corporate grants, * * * corporations usually "acquire property under their grants; and any "property or any rights which become vested "under a legitimate exercise of the powers "granted no legislative act can take away."
>
> Citing:
>
> *Commonwealth vs. Essex Co.*, 13 Gray, 239 (253); *Railroad Co. vs. Maine*, 96 U. S., 499; *Sinking Fund Cases*, 99 U. S., 700; See *Cotting vs. Kansas Stockyard Co.*, 183 U. S., 79.

The State decision of the statement in the District Railroad case does not effect our right.

IX. Franchise is Property and Contract with the State.

(*a*) We understand that the defendants concede that if the tunnel act of 1880, quoted *supra* at p. 4 of this brief is valid our franchise is perfect.

(*b*) So far as these complainants are concerned the validity of that statute has been directly adjudicated.

The application to the General Term on the part of the Central Tunnel Railway Company which resulted in the order appointing commissioners, was one made in judicial proceedings and an adjudication *in rem* binding upon all the world (*Matter of Union Elevated R. R.*, 112 N. Y., 61, 70, *supra* Point VII). This order adjudicates both that the Central Tunnel Railway Company is and then was a valid corporation, and that the General Term had power to appoint commissioners, and upon their report to grant permission to construct a railway without the consent of the abutting owners.

Judicial comity requires that the Federal Court in this case, where proceedings have first been instituted in the State Court, should follow the decision of the latter in the same litigation.

This Court has no jurisdiction to set aside the order of the General Term or to declare the same to be void, at least in the absence of fraud. (*Barrow vs. Hunton*, 99 U. S. 80, 82.)

Matter of N. Y. District R. R. Co., 107 N. Y., 42 does not hold the whole act of 1880 to be unconstitutional. On the contrary, the Court, in the conclusion of this opinion, said:

> "The act may stand as an authority for the "construction of an underground street railway "upon the condition of the assent of the city au- "torities and a half of the abutting values, and "rejecting all the provision for the appointment "of commissioners whose order shall be a sub- "stitute."

IX. Validity of the Tunnel Law.

In People ex rel N. Y. Underground Railway vs. Newton, 58 N. Y., Superior Court, p. 439, the General Term of the Superior Court of the City of New York, held that notwithstanding this decision the statute was still in force, except as to so much thereof as the Court of Appeals had held to be unconstitutional.

The Court of Appeals merely held that so far as the Tunnel Law relieved the N. Y. District Railway Company the route for which was partly upon the surface of city streets, from obtaining the consent of the municipal authorities the statute was inoperative.

In the case at bar we have an express judicial decision that the act of 1880 was valid so far as the Central Tunnel Railway Company was concerned, and that the Court had power to appoint commissioners in such a case to grant consent to the railway company.

The charter of the New York District Railway Company made it a street railroad, for the reason that it provided that it should begin upon a certain street, namely, *on* Broadway, at a point 190 feet from the southerly line of Murray Street and thence under certain streets to another point upon the *surface* of a street (107 N. Y., 51).

> "If now we turn to its manner of construc-
> "tion we observe that it proposes to remove
> "the present surface of the street, and make
> "its own roof that surface in the future. Not
> "merely in the easement of the public affected
> "temporarily by the process of construction,
> "but permanently by changing wholly the sup-
> "port of that surface" (107 N. Y., 51, 52).

Consequently, it necessitated the occupation of a portion of the surface of the street and was a street railroad. That is not the case with the charter of the Central Tunnel Railway. The commencement of the route is in City Hall Park, which is not a street, its termination is at the Grand Central Depot, which is

not a street, and no portion of the surface of the street is to be removed by it. Therefore, no portion of the surface of the street is occupied by it. The Central Tunnel Railway Company is, consequently, not a street railway company within the meaning of the Constitution, and so far as it is concerned the validity of the Act of 1880 can be sustained.

A railroad entirely under the street is not a street railroad.

> In *Nichols vs. Ann Arbor and Y. Street Railway*, 87 Mich., 361, 370, "A street railway" is defined as one, "the rails of which are laid to "conform to the line of the surface of the "street, and which is otherwise so constructed "that the public are not prevented from the use "of any part of the street as a public way, car- "rying passengers, stopping at street crossings "to receive them."
>
> See, also, *State vs. Dayton Traction Company*, 18 Ohio Circuit Court, 490; *Hannah vs. Metropolitan Street Railway*, 81 Mo. App., 78.

X.

The validity of the incorporation of the complainants has been adjudicated by the Supreme Court of the State of New York; and this Court is bound by that decision, which is the best evidence of the law of the state upon that subject.

The order of the General Term upon the petition of the Central Tunnel Railway Company (Ex. B, p. 39, fols. 64-66) declares:

> "It satisfactorily appearing to the Court that "the petitioner is a railroad company formed "under Chapter 140 of the laws of 1850, known

"as the General Railroad Act, entitled 'An act
" 'to authorize the formation of railroad corpor-
" 'ations, and to regulate the same,' and all
"acts amendatory thereof, or supplementary
"thereto, and incorporated for the purpose of
"constructing, maintaining and operating a rail-
"road for public use in the conveyance of per-
"sons and property in the City of New York,
"commencing at a point at or near the City
"Hall Park in said city, and running thence nor-
"therly to and under Chambers Street and
"through the block to and under Reade Street
"to Elm Street; thence northerly through and
"under Elm Street to and under Spring Street;
"thence northerly through the block and under
"the cross streets to and under Great Jones
"Street; thence northerly through and under
"Lafayette Place to and under Astor Place and
"Eighth Street; thence northerly and through
"the blocks to and under Ninth Street to Fourth
"Avenue; thence northerly through and under
"Fourth Avenue to and under Forty-second
"Street, to or near the Grand Central Depot,
"connecting with the Fourth Avenue Improve-
"ment, and that, according to the route and plans
"adopted by the petitioner, it is necessary to
"build said railroad underground and in a tun-
"nel, and that it is the intention of the petitioner
"so to build such railroad under the provisions
"of Chapter 582 of the Laws of 1880; and it
"further appearing to the Court that the con-
"sent of the owners of one-half in value of the
"property bounded on the line of such road,
"cannot be obtained." It then appoints com-missioners with all the powers conferred by the said Chapter 582 Laws of 1880.

X. Res Adjudicata.

This is a decision *in rem* which binds all the world.

Matter of Union Elevated R. R. Co., 112 N. Y., 61, 70, per Gray, J.: "The proceedings be-"fore this tribunal are *in rem* and, under well "settled rules should be conclusive upon all "mankind." See also, *Porter vs. Purdy*, 29 N. Y., 106; *McIntosh vs. Pittsburgh*, 112 Fed. R. 705.

The validity of the incorporation of the Rapid Transit Underground Railroad Company has been established by the judgments of the Supreme Court of the State of New York in the actions brought by the City of New York to collect taxes from them. These judgments are estoppels upon the City of New York, the officers and citizens of that city and all persons subsequently contracting with the city.

Even if these adjudications were not pleaded this Court would take judicial notice of the same. (*Owings vs. Hull*, 9 Peters 607; *Mills vs. Green*, 159 U. S. 651.)

Even if they were not estoppels, they are evidence of the law of the state upon the subject, which this Court is bound to follow; since they were made before the matters in controversy here arose, and relate to a matter of purely local law, the existence and rights of these corporations, and deny no right claimed under the contracts with the state embodied in their charter.

(*Hancock vs. Louisville & N. R. R. Co.*, 145 U. S. 409; *Fitzgerald vs. Mo. Pac. R. R. Co.*, 45 Fed. R., 812.)

XI.

Independently of the validity of so much of the Tunnel Law as allows the consent of the General Term to take the place of the consent of the municipal authorities, our franchise is still perfect.

But even were the rule otherwise, and had this Court the power to disregard the order of the General Term, still the complainants have the right to maintain this bill. It is conceded by the demurrer that the charter of the Rapid Transit Underground Railway Company is still in force, and that that was the first corporation which acquired the right to build a railroad under the streets in question, except its predecessors, whose rights have been assigned to it. That corporation has been prevented by the delay of legal proceedings and the force and threats of the defendants from beginning the construction of its public work. It has the right to an injunction to protect its franchise.

Moreover, it is alleged in the bill (p. 28, fols. 46, 47) and admitted by the demurrer, that:

> "The Common Council, the Mayor and the "local authorities of the City of New York, in "accordance with the provisions of the consti- "tution of the State of New York * * * "have duly given their consent to the construc- "tion of an underground railroad and tunnel "upon the route specified in the articles of as- "sociation and said maps of the said Central "Tunnel Railway Company, and upon the route "of said Central Tunnel Railway Company and "of your orators. The Appellate Division * * "has appointed three commissioners to de- "termine at a hearing of all parties interested "whether an underground railroad and tunnel

"ought to be constructed and operated upon the "route specified in the articles of association "and said maps of the said Central Tunnel Rail-"way Company, and of your orators. Said com-"missioners after duly hearing all parties inter-"ested, in accordance with said constitution and "the said Rapid Transit act have duly deter-"mined that such a railroad and tunnel should "be constructed and operated upon said route. "Their determination in accordance with said "constitution and the said Rapid Transit act "has been duly approved by the said Court and "has been taken in lieu of the consent of the "property owners of property bounding upon "said route. The date of the approval of said "Court was on or about April 6th, 1898. There-"upon, by the entry of such order, said Appel-"late Division perfected and confirmed, as your "orators are informed and believe, the right of "your orators and the exclusive franchise of "your orators to construct a street railroad and "tunnel upon said route."

As soon as that order was entered, consent to such construction of the street railway was immediately granted; and it enured to the benefit of whatever corporation had a right to the same, namely, such as either should acquire by purchase from the Rapid Transit Commission under the Rapid Transit Act, or had before the passage of such act acquired such right, by previous proceedings. The Constitution of the State of New York (Art. III, §18) does not provide that *no person* shall construct a street railroad without the consent of the abutting owners, or the General Term, and that of the local authorities, but that,

"No law shall authorize the construction and

"operation of a street railroad except upon con-
"dition that the consent of the owners in value
"of the property bounded on, and the consent
"also of the local authorities having the con-
"trol of, that portion of a street or highway
"upon which it is proposed to construct or
"operate such railroad be first obtained, or in
"case the consent of such property owners can-
"not be obtained, the Appellate Division of the
"Supreme Court, in the department in which
"it is proposed to be constructed, may, upon ap-
"plication, appoint three commissioners who
"shall determine, after a hearing of all parties
"interested, whether such railroad ought to be
"constructed or operated, and their determina-
"tion, confirmed by the Court, may be taken
"in lieu of the consent of the property owners."
And that "the legislature shall not pass any
"private or local bill * * * granting to any
"corporation, association or individual the right
"to lay down railroad tracks. Granting to any
"private individual association or corporation
"any exclusive privilege immunity or franchise
"whatever."

It is clear that the intent of the Constitution was not that each successive corporation which wished to build and operate a street railroad should obtain a new consent, but that one consent should be in lieu of all.

Such consent was to be withheld or granted in view of the public good that the railroad would serve, and not to depend upon the personality or the political affiliations of those who were to build and operate the railway. Otherwise, such franchises would not be assignable. (*Geneva & Waterloo Railway Company v. The New York Central & Hudson River Railroad Company*, 163 N. Y., 228, 235, 236.) For a personal

license or contract of employment is never assignable. But, however this may be, the defendants upon this demurrer are bound to admit the language of the bill, which alleges specifically that this consent was given to the construction of the street railroad specified in the articles of associaton of the Central Tunnel Railway Company, and that such consent enured to the benefit of the complainants and perfected and confirmed their exclusive franchise to construct a railroad and tunnel upon said route.

The defendants have hitherto made no attempt to controvert this proposition beyond characterizing it as "sheer effrontery" and by a collection of those abusive epithets, which they hope will supply the place of arguments. This Court cannot, we presume, take judicial notice of the language of the order of the Appellate Division and of the resolution of the common council. But if these are to be examined, it will be found that both merely approved the right and method of construction, and that both were silent as to the persons who were authorized to build and operate the railroad.

XII.

The defendants cannot claim that either corporation has forfeited its franchises by non-user, or that its corporate existence has ceased.

(*a*) There is no plea of *nul tel corporation* and the demurrers do not raise this point nor assert any incapacity of the complainants to sue or otherwise.

The point is consequently waived.

Chicago v. Cameron, 22 Ill., App. 91 ; *Conard v. Atlantic Ins. Co.*, 1 Peters, 386.

(*b*) This is a rule of equity practice and of general jurisprudence as to which the Federal Courts are not bound by the decisions of the State of New York, even were they against us which we deny.

(*Gordon v. Hobart*, 2 Sumner, 404; *Burgess v. Seligman*, 107 U. S., 20.)

The only person that can make this claim is the State, or possibly a property owner in a condemnation proceeding. The rule of law is well stated by Mr. Cook in his valuable Treatise on Corporations §637:

> "The question now arises whether the State "or any person, either as plaintiff or defendant, "may allege forfeiture or dissolution or non-"incorporation where there have been no *quo* "*warranto* proceedings instituted and prosecut-"ed by the State to judgment. With a few ex-"ceptions, such an allegation is not allowed. "A creditor of a supposed corporation cannot "ordinarily hold the stockholders liable as part-"ners, although they did not legally incorpor-"ate; it is true also in certain cases where a "stockholder is liable to corporate creditors up-"on a dissolution of the corporation the disso-"lution is held to exist where a corpor-"ation is hopelessly insolvent, and it is the "law that where a railroad corporation at-"tempts to acquire a right-of-way, the person "whose property will be affected thereby may "oppose the acquisition of the right-of-way by "showing that the company is not legally incor-"porated. But, aside from these exceptions, "no one is allowed to assume that the corpora-"tion is dissolved, or its franchises forfeited, or "its incorporation illegal until after such a re-"sult has been decreed by a Court in a proceed-"ing instituted for that purpose by the State,"

XII. Defendants cannot claim Forfeiture.

Ibid, note 7: "Where two railroad companies "claim a right of way, one cannot claim that "the other's charter is forfeitable" (citing *Central Cross Town R. R. Co. vs. Twenty-third St. R. R. Co.*, 54 How. 168-185).

There the plaintiff sought an injunction against the laying of railway tracks which would interfere with the plaintiff's route. Judge Sanford said:

> "One such objection speaks of the right of "the plaintiff in the Bleecker Street and Fulton "Ferry R. R. Co. and its corporate franchises "(1) by non-user (2) by insolvency. The dis- "position which was recently made by the Court "of Appeals of a like objection in the matter "of the New York Elevated R. R. Co., al- "ready cited, renders superfluous any extended "discussion of this point. The forfeiture of "corporate rights is a sovereign prerogative to "be enforced only by and in the name "of the people of the state acting in their "sovereign capacity. It 'cannot be taken "'advantage of or enforced against a cor- "'poration collaterally or incidentally or in "'any other mode than by a direct proceeding "'for that purpose against the corporation, and "'the government creating the corporation can "'alone institute the proceeding.'"

In the case cited (*Re N. Y. El R. R. Co.*, 70 N. Y., 327, 338) an appeal was taken from an order of the General Term affirming the report of commissioners determining that the petitioner might construct its railway upon a certain route. The appellants, who were property owners, claimed that the franchise of the corporation had been forfeited by non-user, and that its corporate existence had ceased. It was *held* that the property owners could not take advantage of this objection in that proceeding.

XII. Defendants cannot claim Forfeiture.

In *New Jersey Southern R. R. Co. vs. Long Branch Commissioners*, 39 N. J. Law, 28:

Held, in a proceeding to enjoin municipal officers from taking a railroad's right of way, that the defendants could not claim that the corporate franchise had ceased and been forfeited by non-user.

In *People's Ditch Co. vs. 176 Inland Water Co.*, 111 Cal., XVI; S. C., 44 Pac. Rep., 176, *Held*, that in a suit by a water company to enjoin another corporation from interference with its water rights the corporate existence of the plaintiff could not be questioned.

See also, *Fresno, C. & I. Co., vs. Warner*, 14 Pac. Rep., 37 (Cal., 1887); *City of Denver vs. Mullen*, 7 Col., 345.

In *American Cable Ry. Co. vs. Mayor of New York*, 68 Fed. R., 227, 228:

The report does not show under which of the New York statutes the railway company was organized, but it seems fair to presume that it was the general act; for the defendant argued that the complainant's corporate existence had been terminated under the statute providing that in case of a default "its corporate powers shall cease," and the New York cases upon which the defendants here rely were then cited.

Judge Wheeler said:

> "The defendants now make question about "the corporate existence of the plaintiff princi- "pally with reference to the seasonable com- "mencement of corporate business. The cor- "poration was organized, and took the title to "this patent, which seems to be within the scope "or its corporate powers. No proceedings have "been taken to terminate it. Under these cir- "cumstances, it seems to exist, so far, at least, "as to be able to maintain this suit against "wrong doers for trespassing upon this corpor- "ate property. Decree for plaintiff."

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XII. Defendants cannot claim Forfeiture.

In the same case, upon appeal, 70 Fed. R., 853, 854, the Circuit Court of Appeals said:

> "The cause was argued before Judge Wheel-
> "er upon the sufficiency of proof of title, the
> "corporate existence of the plaintiff, and the
> "effect of the Italian Patent, who found each
> "of these points in favor of the complainant.
> "* * * * *We perceive no adequate reason*
> *"to question the correctness of Judge Wheeler's*
> *"conclusions."*

Upon a point, however, as to which Judge Wheeler had been bound by a previous ruling of Judge Cox, namely, the non-patentability of the invention, the decree was reversed.

To the same effect is:

> *Santa Rosa City R. R. Co. vs. Central St. Ry. Co.* (Cal. 1895), 38 Pac. Rep., 986; and
> *So. Pac. R. Co. vs. Orton*, 32 Fed. R., 457, 471, per Sawyer, J.:
> "The State of California and the United
> "States being satisfied with the acts of the plain-
> "tiff in respect to the use of its franchise, the
> "grant, and construction of the road, the de-
> "fendant, a mere stranger, without any inter-
> "est whatever, cannot raise the question."
> Citing:
> *Schulenberg vs. Harriman*, 21 Wall. 44; *U. S. vs. Repentigny*, 5 Wall., 267, 268; *So. Postal Tel. & Cable Co. v. Oregon Short Line Co.*, 114 Fed R., 787, 789.
> In *Olyphant Sewage Drainage Co. vs. Borough of Olyphant*, 196 Pa. St., 553, 554, 555, 557:

The plaintiff filed in April, 1899, a bill in equity to

enjoin the officers of the borough from preventing it from constructing a sewer, which it then for the first time attempted to begin. The plaintiff was organized in December, 1895, and then acquired the franchises of a previous corporation of the same name from the purchaser of the same at a sheriff's sale under writ of *fi fa* after judgment, execution and a return of *nulla bona* against the old company. The former company was organized February 27, 1894, and on that day obtained by an ordinance of the Borough Council the right to construct the sewer in question. No part of the work was begun or attempted to be begun before April, 1899. The defendants offered no evidence, but claimed that the evidence offered by the plaintiff proved that the bill should be dismissed. They relied on the Act of May 16, 1889, Pa. P. L., 242, Sec. 11:

> "If any company incorporated under this act, "or any of its supplements, shall not proceed "in good faith to carry on its work and con- "struct or acquire its necessary buildings, struc- "tures, property or improvements within the "space of two years from the date of its letters "patent, and shall not within the same space "of five years thereafter complete the same, the "rights and privileges thereby granted to said "corporation shall revert to the common- "wealth."
>
> "The Supreme Court said: "Tested by the "settled rule of our cases, the conclusion "reached by the learned Judge of the Common "Pleas is right for the reasons stated by him. "We have uniformly held that the validity of "a charter for a public purpose cannot be de- "termined in a collateral proceeding by a pri- "vate suitor. It can be done only in a direct "proceeding to which the commonwealth is a

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"party. Among the more recent cases upon the "subject are *Hinchman v. Philadelphia and "Westchester Turnpike Road Co.*, 160 Pa., 150, "and *Downingtown Gas and Water Co. v. Bor- "ough of Downingtown*, 193 Pa., 255. "Whether a right or franchise claimed by a "corporation is conferred by its charter may be "inquired into in a proceeding at law or in "equity by a party injured, as provided by an "Act of June 19, 1871, P. L., 1361; but whether "for any reason the charter of a corporation "originally invalid or has been forfeited is a "question which the commonwealth only can "raise."

In *Briggs vs. Cape Cod Ship Canal Co.*, 137 Mass., 71, 72, the charter provided that if at least $25,000 were not expended in construction within four months from the passage of the act "this corporation shall "cease to exist."

The Court said: "It is too well settled to ad- "mit of discussion that a corporation can be "judicially determined to have ceased to exist "only in suit to which the commonwealth is a "party.—The act of incorporation is a contract "between the commonwealth and the cor- "poration; whether the corporation has com- "plied with the conditions is a question of fact "to be judicially determined. The common- "wealth may waive a strict compliance with the "terms of the act, and may elect whether it "will insist upon a forfeiture if there has been "a breach of the condition."

Cincinnatti, LaFayette & Chicago R. R. Co., vs Danville & Vincennes Ry Co., 75 Illinois, 113:

Held, that upon a bill to enjoin a railway company from building upon the plaintiff's right of way the de-

fendant could not claim in defense that the plaintiff was not a corporation.

It is well-settled law in the Federal Courts that a right of way, even when it has been unoccupied and no consideration paid therefor, does not, *ipso facto*, lapse for failure to build the railroad in accordance with the terms of a statute, which provides that, in case the railroad is not built within a specified time, the same shall revert to the United States; but that the grantee retains the right to the same, and the Courts will protect it against trespass by others until the United States has asserted the forfeiture by re-entry or judicial proceeding.

> *Schulenberger vs. Harriman*, 21 Wall. 44; *VanWyck vs. Knevals*, 106 U. S., 360; *Grinnell vs. Railroad Co.*, 103 U. S., 739; *Bybee vs. Oregon, &c., R. Co.*, 139 U. S., 663,-676.

In the last case the statute provided that in case of default "this act shall be null and void," &c.

XIII.

Even if the charter of the Central Tunnel Railway Company lapsed, its exclusive franchise to construct a railroad upon the route in question survived, and the persons to whom that franchise was legally transferred, namely the Underground Railroad Company of the City of New York and the Rapid Transit Underground Railroad, had the right to enforce the same.

It would require very clear language to convince a Court that it was the intention of the legislature that a franchise upon which, as here, $100,000 had been expended, should be thus forfeited without a hearing.

XIII. Franchise survives Charter.

It will be remembered that the statute upon which the defendants rely (N. Y., L. 1867, Ch. 775, Sec. 1) does not provide for a forfeiture of any franchise or rights of way which a railroad company may have acquired, but merely provides that, upon its failure to finish its railroad and put it in operation within the ten years in question, "its corporate existence and powers," not its franchises, "shall cease." That, upon the termination of the corporate existence of a railroad company, any franchise to build over a specified route and any right of way that it may have acquired remains unaffected, is well settled.

In *People vs. O'Brien*, 111 N. Y., 1, that question was carefully considered after the repeal by the Legislature of the act incorporating the Broadway Surface Railroad. It was held; that so much of the repealing act as provided for a forfeiture of the franchise to construct and operate a street railway upon Broadway was an infringement of the Constitution of the United States, as an impairment of the obligation of a contract, and consequently void; and that the franchise survived the termination of the corporate existence of the original grantee. The Court of Appeals said, speaking through Ruger, C. J. (at p. 38):

> "That a corporation, although created for a "limited period, may acquire title in fee to lands "or property necessary for its use was decided "in *Nicoll vs. N. Y. and E. Ry.*, 12 N. Y., "121." At p. 42: "It is a matter of public "history that one-half of the railroads of the "state are now operated by organizations other "than those to whom the franchises were origin- "ally granted, notwithstanding their dissolution "through transfers effected by the foreclosure "of mortgages and otherwise. The statutes "cited, as well as others not specially referred

"to, indicate the general policy of the state to "render such interests independent of the life "of the original corporation and transferable "as property by means of judicial proceedings "and otherwise under certain restrictions not "pertinent to our present purpose particularly "to consider."

In *Sulphur Springs, Mount P. Ry. Co. vs. St. Louis A.* and *T. Ry. Co.*, 2 Texas Civ. App., 650 (S. C., 22 S. W. Rep., 107), *held*, that the laches and forfeiture of a corporate charter for failure to build a railroad within three years after incorporation did not affect its right of way which then survived for the benefit of all interested in its assets, and that another company subsequently incorporated could not build a railroad for itself on it.

See also, *New Orleans, S. F. & L. R. R. Co. vs. Delamore*, 114 U. S. 501; *Chesapeak and Ohio Canal Co. vs. Baltimore and O. R. R. Co.*, 4 Gill. & J. (Md.), 1, 123.

Cook on Corporations, §913: "The repeal "or lapse of the charter does not put an end "to the contract or right to operate the road on "the streets."

So. Pac. R. vs. Poole, 32 Fed. R., 451.

Head note: "The filing of the map of general "location of the line of the road by the Southern "Pacific Railroad Company of California, in "pursuance of the Act of Congress, inured to "the benefit of the Southern Pacific Railroad "Company of California, as it existed after its "consolidation, and the amendment of its arti-"cles of association, as the successor in interest "of the corporation, as it existed at the time of "the passage of the act of congress, and of the "filing of said map, even if the two corporations

XIII. Franchise survives Charter.

"cannot be considered as, technically, the same "corporation.'

Canal & Claiborne R. R. Co. vs. St. Charles St. R. R. Co., 44 La. Ann., 1069, 1074.

"When the contracting parties to the contract "of July 26, 1870, met, they met to deal with an "assignable transmissible right. Each of the "parties was expressly contracting for itself, its "successors and assigns. Neither corporation "owned its existence to a charter granted to it, "but both were created by notarial act under the "authority of a general law for the formation "of corporations."

Morgan vs. Des Moines Union Ry. Co. (Iowa, A. D. 1900), 85 N. W. Rep., 902, 906; *held* that a grant by city of a right of way over a street is assignable.

Close vs. Van Loon, 6 T. & C., (N. Y.) 459, 460, was a suit for penalties "for running a tollgate on "a turnpike." The plaintiff claimed the franchise to collect tolls under a conveyance from a turnpike repairing corporation. The Court said, through Boardman, J.:

"Nor is it of the slightest consequence in "this case whether the turnpike company has "been dissolved or still exists. * * * So far "as a forfeiture is urged it is sufficient to say "that the franchise must be forfeited by judicial "proceedings before an individual can avail "himself of its misuser, or omission."

(Citing, *Thompson vs. N. Y. & Har. R. R. Co.*, 3 Sand. Ch., 625; *Adams vs. Black*, 6 Hill., 271.)

Weatherly vs. Capital City Water Co. (Ala.), 22 So. Rep. 140, 144, 145:

Headnote: "A decree of dissolution of a "water company does not abrogate the contract "of the city with the owners of the water works "for a supply."

McCLELLAN, J.: "Contracts within corporate competency, and of a nature to continue after dissolution and bind the property, are not abrogated by the dissolution, but are of continuing efficacy against the successors of the defunct corporation in ownership of its property, assets and franchises. * * *

"This use of the streets, alleys and public grounds, and right of continued user thereof, was and is a property right, protected from destruction by organic guarantees."

"The contract between the city and the owners of the water works was not abrogated by the decree of dissolution."

XIV.

The defendants are estopped from claiming that by non-user the complainants' franchises and corporate existences have been forfeited; and under the allegation in the bill the court should not permit them to make such a claim.

(*a*) The bill alleges in language covering the whole period of time since the incorporation of the Central Tunnel Railway Company

> *"the said defendants, by force and threats, have "hitherto prevented your orators from con-"structing the same"* (p. 28, fol. 47).

Coney Island, Ft. Hamilton & Bklyn. R. R. Co. vs. Kennedy, 15 App. Div., 588, 592, 593, through Judge Cullen, who is now on the Court of Appeals: "It is also contended that the "franchises of the plaintiff have become extinct "by its failure to complete the construction of

"its road within three years after obtaining the "consent. There are two perfect answers to "this claim. The first is that by the amendment "of 1893, Ch. 434, to § 99 of the Railroad "Law, Laws of 1890, Ch. 565, non-compliance "with these conditions of the grant does not "*ipso facto* dissolve the corporation, or de- "termine its rights, but is only a ground of "forfeiture, a forefeiture which can only be "adjudged in a direct proceeding brought by "the state for that purpose. (Matter of *Brooklyn El. R. R. Co.*, 125 N. Y., 434; *Matter of Kings Co. El. R. R. Co.*, 105 N. Y., 97). "*The "second is that these very defendants, by their "acts, have prevented the plaintiff from con- "structing its road, and complying with the "provisions of the statute.*"

In *Dusenbury vs. N. Y. W. & C. Traction Co.*, 46 App. Div., 267, 274, speaking through Hatch, J.: "It is possible that the persons "seeking to *take advantage of the forfeiture "should themselves be estopped* from insisting "upon it; and as the defendant may make a case "which will relieve it from the condition thus "imposed, legal proceedings are necessary to "declare the existence of the forfeiture. (*Matter "of Kings Co. El. R. R. Co., supra*," 105 N. Y. 120).

The same rule applies to this statute that governs defenses founded upon the Statute of Limitations.

Lamb vs. Markin, 43 N. J. Eq., 34, 37: "The "power of a court of equity *to prevent a defend- "ant, by injunction, from setting up the statute "of limitations* as a defense to an action at "law which he has wrongfully procured to be "restrained until sufficient time has elapsed to

"render such a defense available, must, I think, "on the plainest principles of justice, be re- "garded as entirely free from doubt. The "reasons which should control the action of the "court in such cases were stated by Ch. Wil- "liamson in *Doughty vs. Doughty*, 3 Stock (N. "J.), 347, as follows: 'It would be uncon- " 'scientious for a party to plead the statute of " 'limitations against an adversary who, at his " 'solicitation, has been enjoined from prosecut- " 'ing his suit; and it would seem to be the " 'appropriate remedy that the same instrument " 'which he had used to interrupt the legal pro- " 'ceedings of another should be interposed, as " 'a shield, to prevent his taking an undue ad- " 'vantage of such interruption.' "

"But the power of the court thus to control "a citizen and deprive him of a right of de- "fense, conferred by legislative enactment, rests, "in my judgment, exclusively on the maxim "that no man shall be permitted to take ad- "vantage of his own wrong. There is no laches "in such a case. His adversary (the plaintiff) "did not sue before because he was prevented. "And this is the foundation of the jurisdiction "which equity exercises in such cases."

Devereaux vs. City of Brownsville, 29 Fed. R., 742, 751:

"If a State, with the deliberate and confessed "purpose doing that, repeals the charter of a "municipal corporation to enable it to evade or "avoid the writ of *mandamus* to enforce judg- "ments against it, thereby disable the plaintiff "from proceeding with the case, the time of dis- "ability should not be computed in the period "of the statute of limitations. * * * Since the

"act of arrest complained of here is that of the "State itself by its own legislation, and through "its paramount authority, which none can re- "sist, we find no difficulty in implying from the "new legislation and governmental conduct of "the State an intention to exclude the time of "disability from the statute, as is done in case "of war. *Hanger vs. Abbott*, 6 Wall. 532; "*U. S. vs. Wiley*, 11 Wall., 508, 513, where it "was ruled that although the *right* to sue was "unimpaired, 'the loss of the ability to sue, " 'rather than the loss of the right, stops the " 'running of the statute.' And in *Braun vs.* "*Sauerwein*, 10 Wall., 218, where the limitation "was suspended by the operation of an act of "Congress, just as we think this legislation "operates, Mr. Justice Strong remarks of the "decision: 'They all rest on the ground that " 'the creditor has been disabled to sue by a " 'superior power, without any default of his " 'own and therefore that none of the reasons " 'which induce the enactment of the statutes " 'apply to his case; that unless the statutes " 'cease to run during the continuance of the " 'supervening disability he is deprived of a " 'portion of the time within which the law con- " 'templated he might sue.' There are other "applications of the doctrine quite as familiar, "as in cases of delay pending appeals. *Mont-* "*gomery vs. Hernandez*, 12 Wheaton, 129, "134."

(*b*) The bill further shows that the railroad companies have paid taxes upon their franchises assessed against them by the municipal, county and State authorities (pp. 13, 14, fols. 23, 24; p. 11; fol. 19.) *The receipt of the taxes upon the franchises estops the city from disputing their existence.*

XV. Delay Sufficiently Excused.

Monroe Water Co. vs. Township of Frenchtown, 98 Mich., 431, 436:

"The tax was assessed against plaintiff as a "corporation, the moneys paid were by the "corporation, and the defendant cannot now be "heard to say that it was not legally in-"corporated."

To the same effect are *Santa Rosa City R. R Co. vs. Santa Rosa St. Ry. Co.* (Cal., 1895), 38 Pac. Rep., 986; *Commercial El. Ltg. Co. vs Tacoma*, 17 Wash., 661, 670; *Spokane St. Ry. Co. vs. Spokane Falls*, 6 Wash., 521, 524.

For other cases where action by a municipality has been held to constitute an estoppel against the claim that a franchise has been forfeited see *Saugatuck Bridge Co. vs. Town of Westport*, 39 Conn., 337; *State ex rel. Attorney General v. Janesville Water Co.*, 92 Wis., 496, 503, 504.

XV.

The delay of these corporations pending the decision of the general term upon the appointment to fill the vacancy in the commission at the application of the Central Tunnel Railway Company was a sufficient excuse for their inaction, which relieves them from any forfeiture that might otherwise have resulted.

(*a*) Until April 6th, 1898, when the Appellate Division entered an order consenting to the construction and operation of a railroad upon the route owned by the plaintiffs, they had no legal right to begin the construction of their tunnel, although immediately

after their incorporation they duly applied for permission. The subsequent delay was due to the inaction of the General Term (pp. 6-9, fols. 22-33).

> *Hunt vs. Smith*, 3 Rich. Eq. (S. C.), 465, 511, per Chancellor Dargan: "*A claim cannot "grow stale while under the action of the "court.*" *Encyclopaedia of Law*, 2d Ed. Vol. XVIII., p. 110: "Though the litigation, after "it is instituted, does progress slowly, the com- "plainant may not be deprived of relief if he "is not solely accountable for the delay. "(*Pendlery v. Carleton*, 59 U. S. App., 288)." (See *Bell v. Bell*, 181 U. S., 175, 179; *Behrens Drug Co. v. Hamilton*, 48 S. W. Rep., 5.)

(*b*) Courts of equity insert implied conditions and exceptions in statutes of this character in the same manner that they do into statutes of limitations and statutes of frauds (*Supra* XIV). Where a case arises which was apparently not within the contemplation of the Legislature, the *casus omissus* is supplied by the Judge, who holds that the Legislature would have excepted the case had its attention been called to its possibility at the time when the bill was pending, and forbids a defense based upon the statute.

> In the *Matter of Kings County El. R. R. Co.* 105 N. Y., 97, 109, 116, 117, the statute directed that the articles of association " 'shall " 'provide for the release and forfeiture to the " 'supervisors of the county, of all rights and " 'franchises acquired by such corporation' in "case such railway or railways shall not be com- "pleted within the time and upon the conditions "therein provided." The Court of Appeals said, through Danforth, J.: "The charter provision "must have a reasonable construction, and it "is plain that the time during which, and with-

"out fault on their part, the company had no "legal ability to commence or carry on the work, "should not be deemed to form any part of the "allotted period."

In that case, in January, 1879, after failing to obtain the consent of the property owners, the railway applied to the Supreme Court for the appointment of commissioners to grant a consent in lieu of the consent of the property owners.

"The report of the commissioners was made "on April 26, 1879. It was favorable to the "road, and on the same day application was "made for its confirmation. It was opposed, "and remained undecided until February 10th, "1880, when confirmation was refused. In "different courts the controversy between the "company and its opposers continued until Sep- "tember, 1880, when it ended in a decision ad- "verse to the company. Since that time the "affidavits show continuous efforts on the part "of the company, among other things, to obtain "the necessary consent of property owners, "which was accomplished December 2, 1885. "It appears, therefore, that without fault on "the part of the company, the intervening time "was unavoidably consumed in part by legal "proceedings, but also by the impossiblity of "obtaining the consent of the property owners "or its equivalent, and that time may therefore "be added to the specified period named in the "articles of association for the completion of so "much of the road as is now in question."

People vs. Broadway R. R. Co., of Brooklyn, 126 N. Y., 29, 40: "It was its duty to use "reasonable efforts and due diligence to obtain "that consent, as it was its duty to use reasona- "ble efforts and due diligence to build its road

"upon the route mentioned. If it had shown "that it could not procure the consent of the "Plank Road Company, that would have been a "reasonable excuse for not building its road "thereon."

In *Regents of the University of Maryland vs. William*, 9 Gill & J. (Md.), 365; *Held*, "that "the assent of the corporation to the forfeiture "of its charter cannot be inferred from mere "non-user of its franchise caused by the at- "tempt of the legislature to forfeit the same."

U. S. vs. Wiley, 11 Wall. (U. S.), 508, 513, 514: "Statutes of limitation are, indeed, statutes "of repose. They are enacted upon the pre- "sumption that one having a well-founded claim "will not delay enforcing it beyond a reasonable "time if he has the power to sue. Such reason- "able time is, therefore, defined and allowed. "But the basis of the presumption is gone when- "ever the ability to resort to the courts has been "taken away. In such a case the creditor has "not the time within which to bring his suit "that the statute contemplated he should have."

Encyclopaedia of Law, Vol. XIII., p. 757: "When there is no person to sue, or no person "to be sued, no laches can be imputed from "failure to bring suit, and, consequently, the "rule is laid down that there must be in exis- "tence both some one who can sue and some one "who can be sued, or the statute of limitations "will not begin to run."

Ibid., Note: " 'Cause of action implies not "only right of action, but also power of action "(*Baker v. Barcliff*, 76 Ala., 414; *Swann v.* "*Lindsey*, 70 Ala., 507; *Sorrels v. Trantham*, "48 Ark., 386; *Hanf v. Whittington*, 42 Ark., "491; *Brenner v. Quick*, 88 Ind., 546, 555)."

XVI.

The corporate existence of the Rapid Transit Underground Railroad Company has not ceased, nor has its franchise been forfeited.

This bill was filed July 9th, 1901, (p. 43, fol. 69). That corporation was chartered on April 9th, 1897, and it consequently has the power to delay the beginning of the construction of its road until 1902, and to delay the completion of the same until 1907, no matter how strictly Chapter 475 of the Laws of 1867 is construed.

XVII.

The corporate existence of the Central Tunnel Railway Company and of the Underground Railroad of the City of New York, into which the former was merged and consolidated, have not terminated, nor have their franchises been forfeited.

The Underground Railroad of the City of New York was organized on October 21st, 1896, and it consequently has until October 21st, 1906, to complete the construction of its railroad.

The Central Tunnel Railway Company was organized on March 21st, 1881, and it is claimed by the defendants that its corporate existence has ceased under § 1 of Chapter 775, Laws of 1867, which provides,

> "if any corporation formed under an act entitled
> " 'an act to authorize the formation of railroad
> " 'corporations and to regulate the same,' passed
> "April 2nd, 1850, shall not, within five years of

"its articles of association, are filed and recorded "in the office of the Secretary of State, begin "the construction of its road and expend there- "on ten per cent. of the amount of its capital, "or shall not finish its road and put in operation "within ten years from the time of filing its "articles of association aforesaid, its corporate "existence and powers shall *cease*."

The defendants contended that, *ipso facto*, upon the termination of the ten years, if it has failed to comply with the statute, the life of the corporation is terminated, without any judicial judgment or decree and without any hearing; so that no excuse which it has to present may be considered; and that this question of fact may be raised in every case in which the corporation is a party. Such an extraordinary construction, which is inconsistent with the principles of common law, in conflict with every man's sense of justice and inconvenient in practice; which authorizes the trial, of such an important question involving the forfeiture of $100,000 in a court of a Justice of the Peace in a suit involving only twenty-five dollars; is one which no Court can adopt unless conclusively bond by authority. Reliance is placed here by the defendant on two cases decided by the New York Court of Appeals, which it is claimed established this principal. These cases are not binding upon the Courts of the United States in an action where the constitutional rights of the corporation are involved. They are in conflict with the overwhelming weight of authority thorughout this country, and they have been practically overruled by subsequent decisions in the State of New York.

(*a*) In this suit, where it is claimed that there has been an impairment of the obligation of a contract made with the State by the filing of a corporate char-

ter, the expenditure of $100,000 of money in preparation for the construction of the railroad, and the payment of franchise taxes and other taxes to the State; it is the duty of the Federal Courts—and they have the power—to construe the statutes of incorporation, which it is claimed constituted the contracts; independently of the State Courts; and they are not bound in their decisions by the decisions of the latter.

In *New Orleans Water Co. vs. Louisiana Sugar Co.*, 125 U. S., 18, 38, this Court, speaking through Mr. Justice Gray, laid down the rule upon the subject after a full consideration of the authorities:

> "When the State Court holds that there was "a contract conferring certain rights and that "a subsequent law did not impair those rights, "this Court has jurisdiction to consider and "construe the construction of the supposed con- "tract, and if it is of opinion that it did not con- "fer the right affirmed by the State Court, and, "therefore, its obligation was not impaired by "the subsequent law, may, on that ground af- "firm the judgment. * * * So, when the "State Court upholds a subsequent law on the "ground that the contract did not confer the "right claimed, this Court may enquire whether "the supposed contract did give the right, be- "cause, if it did, the subsequent law cannot be "upheld."

In *Brayan vs. Board of Education*, 151 U. S. 639, 650:

> "It is necessary to inquire into the existence "and effect of the alleged contract, and that "question must be determined by this Court "upon its own judgment independently of any "adjudication by the State Court."

In *Huntington vs. Attrill*, 146 U. S., 657-684:

"If the State Court gives effect to a subse-
"quent law which is impugned as impairing the
"obligation of a contract, this Court has power,
"in order to determine whether any contract
"has been impaired, to decide for itself what
"the true construction of the contract is."

In *Jefferson Branch Bank vs. Skelley*, 1 Black, 436, 440:

"Of what use would the appellate power be
"to a litigant who feels himself aggrieved by
"some particular State Legislation, if this Court
"could not decide, independently of all adjudi-
"cations by the Supreme Court of the State,
"whether or not the phraseology of the instru-
"ment in controversy was expressive of a con-
"tract, and within the protection of the consti-
"tution of the United States; and that its obli-
"gation should be enforced, notwithstanding a
"contrary conclusion by a Supreme Court of a
"State."

(*b*) The overwhelming weight of authority is to the effect that clauses of a similar character to that quoted are not self-executing, and that under similar statutes the corporate existence continues until the judgment of a Court upon the writ of *quo warranto*.

In *Wallamet Falls C. & L. Co. vs. Kittredge* 5 Sawy. 44; Fed. Cases No. 17, 105, the statute provided that if any corporation should neglect to carry on its business for six months "its corporate powers shall *cease*."

Held, "That such neglect did not terminate
"the existence of a corporation, but that it was
"a cause of forfeiture, of which the state only
"could take advantage."

In *Young vs. Webster City & S. W. R. R. Co. (Iowa)*, 39 N. W. Rep., 234, where the statute pro-

vided that the corporation "should *cease* to exist" by the non-user of its franchise for two years, a similar ruling was made.

See also, *Taylor vs. Holmes*, 14 Fed. Rep., 498, 505.

In *Mylrea vs. Superior S. C. Ry. Co., Wis.*, 1896; S. C., 67 N. W. Rep., 1138, the statute provided that, where a corporation in fact suspended its ordinary and lawful business for one whole year it should be deemed to have surrendered its rights and franchises, and should be adjudged to be dissolved. *Held*, that until the judgment of a Court of competent jurisdiction the corporation retained its existence.

(See *Stolze vs. Manitowoc Terminal Co. (Wisc.)*, 75 N. W. Rep., 987.)

Mr. Cook, in his standard work on corporations, says, speaking of the New York cases (§638):

> "This drastic and dangerous construction of "charters does not commend itself to law and "justice. It adds one more to the perils which "are attached to all mere corporate enterprises. "Even in New York, where the above doctrine "seems to have had its origin, the Courts are "inclined to limit its application. The New "York courts have recently held that a provision "in a charter that unless certain things are done "within a certain time the company should for-"feit the rights acquired, does not work a for-"feiture, *ipso facto*" (citing *Re Brooklyn, El. R. R.*, 125 N. Y. 434).
>
> *Ibid.*: "Forfeiture, *ipso facto*, is a doctrine "of modern date, it is contrary to reason, justice "and the weight of authority."
>
> See, also, *Brooks vs. Cape Cod Ship Canal Co.*, 137 Mass., 71; and the other cases cited *supra*, under Point XII.

XVII. Charters have not Expired.

In *Bybee vs. Oregon & C. R. Co.*, 139 U. S., 663, 678, this Court said, speaking of these New York decisions:

> "The doctrine of these cases has not been uni "versally accepted, however, and in several "States, notably in Massachusetts, it has been "distinctly repudiated." After citing *Briggs vs. Cape Cod Ship Canal Company*, 137 Mass., 71:
>
> "In *Atchafalaya Bank v. Dawson*, 13 La., "497, an act for the incorporation of a bank "provided that, upon the suspension or refusal "of payment in specie for more than ninety "days, the charter shall be, *ipso facto*, forfeited "and void. But it was held that, until the for- "feiture was judicially decreed, neither the for- "feiture nor the cause could be inquired into in "another suit, nor could the existence of the "corporation be questioned incidentally or col- "laterally. To the same effect is the case of "*Lagrange and Memphis Railroad Company v.* "*Rainey*, 7 Coldwell, 420. In this case it was "held that if an act of incorporation fixes a "definite time in which the charter shall expire, "when the time for this expiration arrives the "corporation is dissolved. But if its continu- "ance beyond a fixed time is made to depend "upon the performance of a given condition, "the non-performance of the condition is a "mere ground for forfeiture. 'This, however, " 'can only be taken advantage of by the State " 'in a proceeding in the nature of a *quo* " '*warranto*, and the existence of the corpora- " 'tion can never be collaterally called in ques- " 'tion.' "

In *Chesapeake & Ohio Canal Co. vs. Baltimore & O. R. R. Co.*, 4 Gill. & J. (Md.), 123, the charter of

the Potomac Company provided (§ 18) that, in case it failed within a specified time to make the Potomac River navigable from Cumberland to tidewater for vessels drawing one foot of water at least, "the com- "pany should not be entitled to any benefit, privilege "or advantage under the act," and that "all the in- "terests of the company should be forfeited and *cease.*"

Held, that the corporation continued in existence with all its franchises until dissolved by a decree of a court.

Held, further, that the franchise upon the dissolution of the corporation might be surrendered and assigned to the canal company.

(*c*) *The New York cases* to which reference has been made have been distinguished to such an extent that they *have been practically overruled.* They are: *Matter of Brooklyn, Winfield & Newtown Ry. Co.*, 72 N. Y. 245, and *Brooklyn Steam Transit, Etc., vs. Brooklyn*, 78 N. Y. 524. In the latter case the Court said, speaking of the former decision:

> "It may be that some of the general language "used in that case may have to be limited in "some future case coming under other circum- "stances and depending upon other facts. * * * "Under the law, as we have laid it down in this "and the prior case, it could not take private "property or a public street for the construction "of the last mile. A corporate right *for that "purpose"—namely, the institution of con- demnation proceedings—"would be absolutely "gone, and that is as far as the facts of this case "require us to go now."*

In re Brooklyn El. R. R. Co., 125 N. Y., 434, 441, the Court of Appeals said of these cases, speaking through Judge Earl:

"They are border cases, and the doctrine laid "down in them should not be applied to cases "where the legislative intent of a self-executing "forfeiture is not equally plain. An undue ex- "tension of the doctrine would imperil the vest- "ed rights of individuals, and in many cases "might prejudice the interests of the public."

It was, accordingly, *held*, that a statute was not self-executing which provided that for non-performance of certain conditions the corporation "should forfeit "the rights acquired" by it under its acts of incorporation.

In *Dousenbury vs. N. Y. W. & C. Traction Co.*, 46 App. Div., 267, 268, 273, the corporate charter provided that in case of failure to complete the road before a certain date, "then this franchise shall be forfeited, "and the rights and privileges granted by it shall cease "and determine without any action or proceeding in "law or otherwise."

The Court said, speaking through Hatch J.: "While the language of the twelfth clause of "the consent is broad enough in terms, *ipso* "*facto*, to work a forfeiture without any legal "proceeding, yet we apprehend that such force "and effect should not be given to it. It may "very well be that conditions have existed which "furnished a legal excuse to the railroad com- "pany for not complying therewith."

In *Matter of N. Y. & L. I. Bridge Co.*, 148 N. Y. 540: the charter provided that the bridge should be commenced within two years and continued without any unreasonable delay until completed, "or this act "and all rights and privileges granted hereby shall be "null and void." *Held*, that no one except the State could raise the question of the forfeiture or that the corporate existence had ceased.

XVII. New York Cases Distinguished.

Santa Rosa City R. Co. vs. Central St. Ry. Co. (Cal-1895), 38 Pac. Rep., 986, expressly overrules these New York cases and the former California decisions and holds: that the phrase "a failure to comply with these provisions, work a forfeiture" of the right of way, as well as of the franchise, is not self-executing, and cannot be enforced except in a suit by the State; that acceptance of taxes by the city estops it from setting up the forfeiture; that a grant by the city of the same rights to another corporation is not an assertion of a forfeiture; and then the former may enjoin the latter company.

The *Brooklyn Steam Transit case* arose under a special charter, which provided in far different language from that in the General Railroad Law for a forfeiture, *ipso facto*, as was held by the Court, that, in case of failure to build a mile of road within three years, "this act and all the powers, rights and fran-"chises herein and hereby granted shall be deemed "forfeited and terminated."

In the *Brooklyn, Winfield and Newton Railroad case*, which arose under the General Railroad Law, the defense was set up by a property owner in opposition to a condemnation proceeding, where the statute expressly authorizes a contest as to the corporate existence of the petitioner. L. 1850, Ch. 140, §§ 14, 15; *Re Brooklyn W. & N. Ry. Co.*, 72 N. Y., 245, 249.

There was no claim that the defendants were estopped from setting up the defense that the charter had lapsed. Nor was there any excuse for the delay, such as the pendency of legal proceedings, which were held to prevent the forfeiture in the *Kings County Elevated Railroad case*, 105 N. Y., 97, and other cases quoted *supra*, Point XV.

Nor had the franchise been assigned to a corpora-

tion still in existence. Nor had any substantial sums of money been expended in preparing for the construction and survey of the route. These complainants have spent more than $100,000 for that purpose.

(*d*) This statute was amended by N. Y. L. 1893, Ch. 443, (Vol. I., p. 907, § 5), which provides that:

> "If any such steam railroad corporation, "whose certificate of incorporation was filed "since the year eighteen hundred and eighty, "and whose road, as designated in such certi- "ficate, is wholly within one county and not "more than ten miles in length, has acquired "the real property necessary for its roadbed "by purchase, its corporate existence and powers "shall not be deemed to have ceased because of "its failure to comply with the provisions of "this article; and the time for beginning the "construction of its road and expending thereon "ten per centum of its capital is extended until "thirteen years from the date of the filing of "such certificate, and the time for finishing its "road and putting it in operation is extended "until eighteen years from the date of such "filing."

The complainants have acquired the real property necessary for their roadbed by purchase through the payment of their franchise taxes to the State and City of New York.

XVIII.

The Rapid Transit Act is void as a denial to the complainants of the equal protection of the laws.

The acts of the defendant and the legislation upon which they rely are unconstitutional, because a violation of the Fourteenth Amendment of the Federal Constitution, which ordains that no State shall "deny to "any person within its jurisdiction the equal protec- "tion of the laws."

This question was not before the Court of Appeals in the Sun case. The act of 1896 had not been passed, nor was the contract made when that suit was brought, December 12, 1895.

This point is stated at length in paragraph XVII of the bill (pp. 31, 32, fols. 51-53) and for that reason we now discuss it very briefly. In reliance upon New York Laws of 1896, that Chapter 729 which provides:

> "that any corporation organized under the "corporation laws of this state, and approved "by the said Board of Rapid Transit Commis- "sioners, shall be competent and is hereby au- "thorized to enter into a contract for the con- "struction and operation of any railway pursu- "ant to the provisions of this chapter:"

the Rapid Transit Board has granted to the defendant, the Rapid Transit Subway Construction Company, the right to construct and operate an underground railroad upon our route. That corporation is not organized under the General Railroad Law of this State, nor under any special statute. It is a business corporation, organized under the Business Corporaroad Law. None of the safeguards to the passengers, abutting owners and public at large which are required

by the General Railroad Law: as to the manner in which it shall operate its railroad, (N. Y. G. L. Ch. XXXIX, Art. II, §§ 12, 31, 34, 35, 37, 38, 39, 45, 56; Street Railroad Law, Art. IV, §§ 101, 138); the precautions for the benefit of abutting owners and passengers which it shall observe (N. Y. G. L., Ch. XXXIX, Art. I, §§ 4, 5, 6, 11, 13, 16, 30, 31, 32, 33, 34, 35, 36, 42, 43, 44, 45, 46, 48, 49, 50, 51, 61, 62, 64, 67, 68; Street Railroad Law Art. IV, §§ 108, 125); the requirement of the payment in full of subscriptions to its capital stock (N. Y. G. L., Ch. XXXIX, Art. I, § 2, Subds. 6, 13); prohibitions against an improper amount of bonded indebtedness (*Ibid.*, Art. I, § 4, Subd. 10); inhibitions against discriminations in the carriage of passengers and freight (*Ibid.*, Art. II, §§ 39, 47, 48; Street Railroad Law, Art. IV, §104); obligation to equality in its treatment of connecting railroads (*Ibid.*, §§ 12, 35, 47); subjection to the jurisdiction of the State Railroad Commissioners (*Ibid.*, Art. II, §§ 59, 67; Art. VI, §157); or of many other obligations to which railrod companies are subjected; are imposed upon it.

It thus has a special privilege and monopoly not granted to any other corporation in this State or in the United States. Such a privilege is void, not only because forbidden by the State Constitution, but also because in violation of the Fourteenth Amendment to the Constitution of the United States.

All other railroad companies in this State, including these complainants, are subjected to penalties, prohibitions and obligations, from which this defendant is relieved. Consequently, the plaintiffs have been denied the equal protection of the laws of the United States.

Connelly v. Union Sewer Pipe Co., 184 U. S. 540.

XVIII. Denial of Equal Protection of the Laws.

In *Niagara Fire Ins. Co. vs. Cornell*, 110 Fed. R., 816: a Nebraska act, which forbade fire insurance companies from making agreements permitted to persons engaged in other business, was held to be void for the same reason.

The same principle invalidates statutes which grant special privileges to a single person natural or corporate, to a municipal as well as to a private corporation.

A number of cases upon this point are collected in the opinion of Mr. Justice Brewer in *Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis*, 165 U. S., 150, 164; amongst others:

> "*Janesville vs. Carpenter*, 77 Wisconsin, 288, "in which a statute authorizing suits for in- "junction to be maintained in favor of certain "parties under circumstances differing from "those which obtained in respect to all other "suits of a similar nature was likewise held to "be void."

So in *Durkee vs. Janesville*, 28 Wisconsin, 464, 465, an act was held void which

> "declared that no costs shall be recovered "against the city in any action where the same "is commenced to set aside any tax assessments "or tax deed, or to prevent the collection of "taxes or assessments in said city. It is said "in answer, that these provisions of the charter "are inoperative and void because in violation "of that principle of constitutional law which "prohibits unequal and partial legislation upon "general subjects—the enactment of a special "law dispensing with the general law in a par- "ticular case, or granting to one or corpora- "tion, by way of exemption from the operation "and effect of a general law, a privilege or in- "dulgence which no other person or corporation "has or enjoys. There is no reason to doubt

> "the existence or correctness of the constitu-
> "tional principal which forbids such legisla-
> "tion. Enactments of the kind have frequently
> "been held unconstitutional and void."

Citing a number of authorities, amongst others:

Simonds vs. Simonds, 103 Mass., 572; *Holden vs. James*, 11 Mass., 396

In *Hincks v. Milwaukee*, 46 Wis.,559, *held*, that a city charter, declaring that the city shall not be made liable for injuries caused by the negligence of a contractor in leaving obstructions in a public street, is invalid, as an attempt to grant a privilege or immunity to the city against a general rule of law, while all other municipal corporations are left subject to its operation.

In *Gordon vs. Winchester Building & Acc. Fund Assn.*, 12 Bush, (Ky.), 110, 113; the Court said:

> "That the appellee is a corporation can not
> "effect the decision of this question. It will
> "not be contended that the legislature has power
> "to confer upon a corporation privileges or to
> "grant to it exemptions which it can not con-
> "stitutionally confer upon or grant to a natur-
> "al person."

Held, that an act was void which authorized a corporation to receive a greater rate of interest than was permitted to be taken by other corporations or individuals.

In *State Bank vs. Cooper*, 2 Yerger (Tenn.), 599: *Held*, that a statute which created a Special Court for the determination of suits commenced by the Bank of the State of Tennessee against the officers of the bank and other defaulters to that institution, was unconstitutional and void.

In *Van Zant vs. Waddel*, 2 Yerger (Tenn.), 599: *Held*, that an act was void which gave new and additional remedies to the creditors of two specified banks.

XVIII. Denial of Equal Protection of the Laws.

In *Wally's Heirs vs. Kennedy*, 2 Yerger (Tenn.), 554: *Held*, that an act which authorized the dismissal of a certain class of cases, where prosecuted for the use of another, was also void.

In *Memphis vs. Fisher*, 9 Baxter (Tenn.), 239: *Held*, that an act which provided that *cities of more than a specified population* might sue and obtain provisional remedies and prosecute appeals without giving the security for costs required of other litigants was also void.

See, also, *Cooley's Constitutional Limitations* (6th Ed.), 484-491.

The fact that the statute gives to the Rapid Transit Board the right, arbitrarily, to select the favored corporation does not cure the violation of the constitution. What the Legislature cannot do directly, it may not accomplish by indirection.

The Courts of the United States will interfere and protect the corporation or individual who is denied equality by any branch of the State Government, legislative, executive or judicial.

Yick Wo vs. Minnesota, 179 U. S. 223, 262; 118 U. S. 356, 373, 374, 132; *Stearns v. Central of Georgia Ry. Co.*, 110 Fed. R. 865; *Riverside S. A. Ry. Co. v. Riverside*, 118 Fed. R. 736, 741.

Corporations, as well as individuals, are protected by this clause of the Fourteenth Amendment; and their constitutional right to equality cannot be denied them under the guise of an amendment to their charters (*Cotting vs. Kansas City Stock Yards Co.*, 183 U. S. 79).

As regards this point it makes no difference whether or no the complainants have the exclusive franchise which they claim.

It is immaterial that one of the complainants was incorporated subsequently to this statute. The other

was not, and the junior company has succeeded to its rights. Moreover the constitutional protection is for the benefit of the individuals who form or who may wish to form corporations; and their right to organize and to compete upon equal terms with others was impaired by this unjustifiable discrimination.

XIX.

The Rapid Transit Act is also void as an infringement of the constitution of the State of New York.

This Constitution forbids the passage by the Legislature of any private or local bill "granting to any cor- "poration, association or individual the right to lay "down railroad tracks" (Art. III, Sec. 18).

The Rapid Transit Act is printed in the New York Session Laws as a local bill (L. 1895, Vol. II). It was presented to the Mayor of the City of New York for his approval before its final passage. It applies only to the cities of the State with more than one million inhabitants, according to the last preceding census. The old City of New York was the only city with that population. In the opinion of the New York Court of Appeals the bill is a local bill (*The Sun Printing & Publishing Assn. vs. Mayor*, 152 N. Y. 257, 272; See *Stack vs. Brooklyn*, 150 N. Y. 335).

That this constitutional inhibition applies to a grant to a municipal corporation is clear from the language of the section, which contains two clauses in close juxtaposition. One of them forbids the "granting to "any *private* corporation, association or individual any "exclusive privilege, immunity or favor there whatever." The other has just been quoted. The use of the word private in one clause and its omission from the

other clearly shows the intention that the prohibition of the special grant to lay down railroad tracks applies to all corporations, private and public or municipal. This was held by the New York Court of Appeals in 1886 (*People ex rel Harvey vs. Loew*, 102 N. Y., 471, 476).

In the Sun case, the case of Harvey was not mentioned. Since the complainants were both incorporated after the decision in Harvey's case, no subsequent decision of the New York Courts changing the construction of the Constitution then in force can affect their rights.

(*Ohio Life Ins. & Fire Co. vs. Debolt*, 16 How. (U. S.), 416; *Gelpcke vs. Dubuque*, 1 Wall., 175; *Anderson vs. Santa Anna*, 116 U. S., 356; *Southern Pine Co. vs. Hal* (C. C. A.), 105 Fed. R., 84.)

XX.

Since these questions are certainly doubtful, the demurrer should be overruled, and the ultimate decision reserved till the final hearing

See *Kansas v. Colorado*, 185 U. S. 125; *Storms vs. Kansas Pacific Co.*, 5 Dillon, 486; *Burnley vs. Jeffersonville*, 3 McLean, 336; *Standard Oil Co. vs. So. Pac. Ry. Co.*, 42 Fed. R. 295.

XXI.

The relief sought will not block or delay the completion of the construction or the operation of the Underground Railroad.

The demurrer admits: that the complainants are ready and willing and have offered to re-pay to the city the amount which it has advanced for the construction of a railroad and tunnel; and that they are ready and willing, that they have offered to complete the same in accordance with the plans and specifications prescribed by the Rapid Transit Commissioners, which are copied from those previously drawn by the complainants' engineers at the complainants' expense; and to operate the railroad in accordance with the statutes of the State of New York (p. 33, fol. 55, p. 28, fol. 46). The defendants are estopped by their demurrer from disputing the ability of the complainants to do this, which may be made a condition of the decree herein. Moreover, upon the security of so valuable a franchise, the money necessary for this purpose could be borrowed in Wall Street within one-half an hour.

It may be, however, that upon the final hearing after proofs have been taken, the Court will not give us all this relief, but will direct that upon the payment of the value of our franchise an injunction be withheld.

In neither event, will this public improvement be delayed.

XXII.

The decree should be reversed and the demurrers overruled, with costs of this Court and of the Circuit Court.

Respectfully Submitted,
ROGER FOSTER,
Of Counsel for ComplainantsAppellants.

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Supreme Court of the United States.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and another, Complainants, Appellants,

AGAINST

THE CITY OF NEW YORK and others, Defendants, Respondents.

No. 150.

SUPPLEMENTAL MEMORANDA FOR APPELLANTS.

I.

The Judiciary Acts of 1875, 1887 and 1888, following the Constitution, give to the Circuit Court of the United States jurisdiction of all causes "arising under the Constitution or laws of the United States," provided that the matter in dispute exclusive of interest and costs exceeds in value $2,000. It cannot be said that a case has not arisen under the Constitution of the United States because the Court has held therein that the plaintiffs' claim to a right under the Constitution is unfounded.

If the Court is asked to decide a real question concerning the applicability of the Constitution, the case arises under that Constitution and the Circuit Court has jurisdiction to determine the same, whether it sustains the claim of a constitutional right or not. Jurisdiction is the power to declare

the law upon the subject and it is not lost because the relief sought is denied. If that were the case the judgments in all cases denying relief claimed under the Constitution, both in this Court and in the Circuit Court, would be without costs; but an examination of the records will show that that has never been so hitherto. Here, however, the dismissal of the bill was without costs, because the Circuit Court considered that it had no jurisdiction over the subject.

When the Circuit Court decided that the claim of a right protected by the Constitution was unfounded, it did not lose jurisdiction over the other questions raised by the bill. The rule is well settled, that, when a Circuit Court has once obtained jurisdiction over a case, it does not lose the same because of some occurrence during the progress of the litigation which, if in existence at the commencement, would have prevented the attachment of the jurisdiction. This is even the case where the jurisdiction depends upon a difference of citizenship. Thus, a change of citizenship after the jurisdiction has once attached will not divest the same (*Ober* vs. *Gallagher*, 93 U. S., 199, 206; *Stewart* vs. *Dunham*, 115 U. S., 61, 64; *Phelps* vs. *Oakes*, 117 U. S., 236; *Hardenbergh* vs. *Ray*, 151 U. S., 112).

"Having obtained rightful jurisdiction of the "parties and the subject matter of the ac- "tion for one purpose, the Court will make its "jurisdiction effectual for complete relief. Story's "Eq., 64, *K* * * * Having jurisdiction for one "purpose, it may be retained for all within the "general scope of the equities to be enforced." (*Ober* vs. *Gallagher*, 93 U. S., 199, 206, per Chief Justice Waite).

This is even the case when a change of citizenship occurs before an amended bill is filed (*Tug River C. & S. Co.* vs. *Brigel*, 86 Fed. R., 818). The transfer of the plaintiff's interest to a citizen of the same State as the defendant does not divest the Court of

jurisdiction (*Jarboe* vs. *Templer*, 38 Fed. R., 213; *Glover* vs. *Sheppard*, 21 Fed. R., 481). Neither is jurisdiction lost because a defendant ceases to resist the plaintiff's demand (*Park* vs. *N. Y., L. E. & W. R. Co.*, 70 Fed. R., 641). Nor by the addition of new parties whose citizenship would have prevented their original joinder in the suit, whether they are brought in by amendment (*Ober* vs. *Gallagher*, 93 U. S., 199, 206; *Stewart* vs. *Dunham*, 115 U. S., 61, 64; *Phelps* vs. *Oakes*, 117 U. S , 236; *Hardenbergh* vs. *Ray*, 151 U. S., 112); or by intervention (*Park* vs. *N. Y., L. E. & W. R. Co.*, 70 Fed. R. 641; *Society of Shakers* vs. *Watson* (C. C. A.), 68 Fed. R., 730; *Osborne & Co* vs. *Narge*, 30 Fed. R., 805; *United El. S. Co.* vs. *La. El. Co.*, 68 Fed. R., 673; *Henerson* vs. *Goode*, 49 Fed. R., 887; *Belmont Nail Co.* vs. *Columbia L. & S. Co.*, 46 Fed. R., 336; *Sioux City T. R. R. & W. Co.* vs. *Trust Co. of N. A.* (*C. C. A.*), 82 Fed. R., 124; s. c., 173 U. S., 99). So, where at the time of the commencement of the suit, the value of the matter in dispute exceeds the jurisdictional amount, the Court has jurisdiction to enter judgment for a less sum (*Smith* vs. *Greenhow*, 109 U. S., 669; *Wilson* v. *Daniel*, 3 Dall., 401, 407; *Barry* vs. *Edmunds*, 116 U. S., 550, 560; *Gorman* vs. *Havird*, 141 U. S., 206); and will retain jurisdiction for that purpose, although the plaintiff's demand for damages was excessive, unless it clearly appears and is proved that such demand was not made in good faith, but merely in order to bring suit in a Federal court. Neither is jurisdiction divested by an admission in defendant's answer of part of the plaintiff's claim, when, at the time of the commencement of the suit, the complaint shows that the matter in dispute exceeds the jurisdictional amount (*Fuller* vs. *Metropolitan Life Ins. Co.*, 37 Fed. R., 163).

If the theory of the respondents is correct, there is no adequate remedy for a person, who has a right to an injunction, but who is in doubt as to whether the grounds for his relief depend upon the Constitution or upon general principles of equitable juris-

prudence. If he sues simultaneously in the State and Federal court, there may be a plea in abatement or a motion for an election. If he first sues in either Court and is unsuccessful there, his second bill may be dismissed by the other tribunal for laches; and the decree of the State court, at least, against him, is an absolute bar to any suit in the Federal court for the same relief upon other grounds (*Bienville Water Supply Co.* vs. *Mobile*, 186 U. S., 212, 216, quoted at p. 23 of Brief).

II.

Irrespective of the validity of the franchise of the Central Tunnel Railway Company, it is clear that its lessee, the Rapid Transit Underground Railroad Company, has a valid franchise and a vested right to the easement and underground right of way which have been invaded by the defendants. The latter company was organized April 9, 1897, under § 16 of Chapter 39 of the General Laws of the State of New York, known as the Railroad Law. This re-enacts the Tunnel Law of 1880, as amended, by providing that "such road or any part of it may be "built within the limits of *any* city or incorporated "village of this State" (thus including the City of New York), "and run by means of a tunnel under-"neath any of the streets, roads or public places "thereof," provided, that, before construction the consent to the railroad be obtained from "the proper "authorities of the city having control of such "streets, roads, or public places," and the consent of the owners of one-half in value of the abutting land, or if the consent of such property owners cannot be obtained, the consent of the General Term of the Supreme Court in the District, to the rights of which the Appellate Division has succeeded, who must first appoint three commissioners "who

"shall determine, after a hearing of all parties in-
"terested whether such railroad ought to be built
"underneath such streets, road or public places, or
"any of them, and in what manner the same may
"be so built with the least damage to the surface
"and to the use of the surface by the public and the
"determination of the commissioners confirmed by
"the Court may be taken in lieu of the consent of
"the property owners."

As to the constitutionality of this statute, there has been no question. Thereafter the municipal authorities of the City of New York duly consented to the construction of an underground railroad on the route described in the articles of the Central Railway Company and of the Rapid Transit Underground Railroad Company. Subsequently the Appellate Division appointed three commissioners, after the failure of the property owners to give the requisite consent, and on April 6, 1898, duly approved the determination of those commissioners, "that such a railroad and tunnel should be con-
"structed and operated upon said route" (Record, p. 28). This approval perfected the franchise of the Rapid Transit Underground Railroad Company, at least. It makes no difference upon whose application such approval was made, although an application by the Central Tunnel Railway Company is shown by the bill to have been then pending before the Court. It makes no difference under the State Constitution at whose application the consent is given nor was the consent confined by either the municipal authorities or the Appellate Division to municipal construction. The Constitution is quoted at pages 69 and 70 of our brief in chief. It merely provides that "*the consent*" shall be obtained. There is no mandate that such consent shall be confined to a particular person. On the contrary, it has been held by the Court of Appeals, that a consent for the construction of a street surface railroad obtained by a railroad company prior to the adoption of that constitutional provision can thereafter

be enjoyed by a corporation subsequently formed when the former has abandoned its rights to the latter, although such new corporation has obtained no consent to use the street from either the Court, the property owners, or the municipal authorities (*Ingersoll* vs. *Nassau Electric R. R. Co.*, 157 N. Y., 453. See point XI. of Brief, p. 70). In *Geneva & W. Ry. Co.* vs. *N. Y. C. & H. R. R. Co.*, 163 N. Y., 235, the Court of Appeals said speaking through Judge O'Brien: "What the Constitution "and the statute requires in such cases is simply "the consent of the property owners that the high-"way through his property may be burdened with "another easement in the form of a railroad."

It is alleged on the face of the bill and admitted by the demurrer that the consent of the municipal authorities and of the Appellate Division was not limited to municipal construction, but was a general consent to the construction of the railroad by any one who had the prior right thereto. If the defendants refer to the history of the transaction they will substantiate the charges in the bill. Originally, the Rapid Transit Commissioners projected their railroad under Broadway, not under Elm street: saying in their petition to the Common Council: "Legal "difficulties apart from all questions of advantage "have prevented resort to Elm street." That project having failed, application was then made in similar form to that of the Central Railway Company to the Appellate Division, which had before it both applications, and gave its consent in general form stating: "The consent of this Court" was "given to the construction and operation of the said "railway." The language of the municipal authorities, the Common Council of New York City, was similar. This left after that consent was given the construction of the railroad, and the operation of the same to be exercised by the person who had the first right to that franchise. It is conceded in the respondents' brief that the filing of the map and location of the route gives to the locator the prior

right thereto against any other railroad companies, although it is claimed not as against the State.

Here the State has not interfered by taking our route for its own use, nor has the Legislature in the Rapid Transit Act or elsewhere repealed the Tunnel Law or the section of the Railroad Law under which we were incorporated. The general authority given to the Rapid Transit Commission to select an underground route (§§ 4 and 5 of Rapid Transit Act, Bill VII., Rec., 15) must be construed not to include routes previously appropriated by others.

The learned District Judge, who overruled the demurrer shows by his opinion, that he misconceived the law and believed that the consent of municipal authorities must precede application to the Court (Rec., 58). This is required neither by the Constitution nor by any statute. The only prerequisite is the refusal of the consent of the property owners. There is a further misconception upon his part due to a belief that the Street Surface Railroad Law, which by its terms is limited to railroads upon the surface of a street, applies to railroads underground; and that consent to the latter must be given in accordance with the terms thereof which require, that the consent to build a street surface railroad shall be granted to a specified corporation, namely, that which bids at a public auction the highest price for the privilege. Nothing of the sort is to be found in either the State Constitution or the tunnel law, which merely require a consent to the construction of a railroad in a street, not a consent that a favored group of individuals shall make such construction.

Chapter 10 of the New York Laws of 1860, quoted by respondent, also by its terms is confined to railroads upon the surface of a street. Were it otherwise, it has been, so far as underground railroads are concerned, repealed by the tunnel law of 1880, which at its close expressly refers to New York City.

Nowhere in the Rapid Transit Act can be found any declaration that previous rights

of way or tunnel rights or franchises are thereby repealed or their exercise forbidden. It must be presumed, consequently, that the Legislature did not intend that the Rapid Transit Commissioners should interfere with them. For that reason, our Elm street route was at first not selected by those Commissioners who said in their petition to the Common Council: "*Legal difficulties, apart from all questions of advantage, have prevented resort to Elm street.*" The position of the appellants is, therefore, like that of the Suburban Rapid Transit Company in its suit against New York City (128 N. Y., 510, Brief, 53). There as here, after the route was located but before the building of the railroad was begun, a statute was passed which in general terms permitted the city to condemn for public purposes land including that covered by the plaintiff's projected route. It was held, that authority to take the latter was not given to the city.

The omission to obtain the constitutional consent before the appellants filed their maps, did not prevent them from acquiring the route therein described. The consent of the municipality and authorities who jointly own the fee and easement in a street, is nothing more than the consent of the owners of the right of way; and the application to the Court for a consent in lieu of that of the abutters is analogous to a proceeding to condemn their easement. The cases cited in our brief (50–53) hold that the filing of the maps secures a vested right long before the right of way is obtained.

The provision in the Rapid Transit Act concerning the application for the consents of the Common Council and the Court is in § 5 (N. Y. L. 1891, ch. 5, § 5, as amd. by L. 1895, ch. 519, § 2) copied *infra*. This provides merely for an approval "of any such "route or routes and of any general plan of con- "struction of said railway or railways" proposed by the Rapid Transit Commission. The section applies to all cases, both where an underground road is to

be constructed and operated by the City and where, as was the original plan, of the statute and of the commission, and as the act still permits, it is to be built and operated by a railroad corporation for its exclusive benefit. The route adopted by the Rapid Transit Board was our route as described in our articles of association. The plan of construction was our plan, drawn by our engineers, using for that purpose our surveys, plans, maps, figures, estimates and borings upon which we had expended $100,000 (Rec., 4, 28).

III.

We submit that the following section of the Rapid Transit Act denies to the appellants and other taxpayers who have no such exemption from taxation the equal protection of the laws:

§ 35. "The person, firm or corporation operating "such road, shall be exempt from taxation in re- "spect to his, their or its interest therein under said "contract and in respect to the rolling stock and "other equipment of said road, but this exemption "shall not extend to any real property which may "be owned and employed by said person, firm or "corporation in connection with the construction "or operation of said road" (New Section added by N. Y. Laws 1894, Ch. 752, § 9).

Stearns v. *Minnesota*, 179 U. S., 223, 262; *Cheaney* v. *Hooser*, 9 B. Monroe (Ky.), 330; *County of San Mateo* v. *So. Pac. R. R. Co.*, 13 Fed. R., 722; *County of Santa Clara* v. *So. Pac. R. R. Co.*, 18 Fed. R., 385; *Lexington* v. *McQuillan's Heirs*, 9 Dana (Ky.), 513; *State* v. *Readington*, 36 N. J. Law, 66, 70; *Cheshire* v. *County Commissioners*, 117 Mass., 386; *Commonwealth* v. *Clark*, 195 Pa., 634, 635; *Campbell* v. *Shaw*, 11 Hawaiian Rep., 112.

IV.

The following language of Judge O'Brien, in which Judges Bartlett and Vann of the New York Court of Appeals concurred, although from a dissenting opinion, is, we submit, a correct statement of the law (*Ryan* vs. *New York*, N. Y. L. J., Feb. 11, 1904):

"When the State creates a corporation, public or "private, and sends it forth upon its mission, it be- "comes invested by the constitution and the law of "its creation with certain rights and privileges that "are as inviolable as those of private persons. Its "property may not be confiscated or taken from it "except by its consent or by due process of law. It "cannot be denied the equal protection of the law. "The money which a city procures by the exercise "of the taxing power cannot be diverted, directly "or indirectly, to any private purpose or for the "benefit of any class as such. * * *

"Sweeping aside all forms and seeking to estab- "lish the real legal situation, the city in this re- "spect is nothing more than an aggregation of pri- "vate citizens, who are taxpayers, and as such are "entitled, acting in the combination created by the "charter, to the protection, through the legal entity "thereby created, of all those individual rights and "privileges precisely as if each was acting for "himself."

See COOLEY, *J.*, in *People* v. *Common Council of Detroit* (28 Mich., 228).

Respectfully submitted,

ROGER FOSTER,
Of Counsel for Appellants.

Rapid Transit Act, § 5.

(N. Y. L. 1891, ch. 4, § 5, as am'd L. 1895, ch. 519, § 2.)

After any determination by said board *of any such route or routes and of any general plan of construction of said railway or railways*, the said board shall transmit to the common council of said city a copy of said plans and conclusions as adopted. It shall be the duty of such common council upon receiving such copy of plans and conclusions to appoint a day not less than one week nor more than ten days after the receipt thereof for the consideration of such plans and conclusions, and the said Common Council shall, on the day so fixed, proceed with the consideration thereof and may continue and adjourn such consideration, from time to time, until a final vote shall be taken thereon, as hereinafter provided. Within four weeks after the copy of such plans and conclusions adopted by the Board of Rapid Transit Railroad Commissioners shall have first been received by said Common Council, a final vote shall be taken thereon, by ayes and nays, in the form of *a vote upon a resolution to approve such plans and conclusions, and to consent to the construction of a railway or railways in accordance therewith*. Upon the adoption of such resolution by a majority vote of all the members of the Common Council and the approval of the Mayor, and in the case of the refusal or failure of the Mayor to approval such resolution, then by a two-third vote of all the members of the Common Council, *the said plans and conclusions shall be deemed to have been finally consented* to and adopted, *and such consent shall be deemed to be the consent of the local authorities of such city;* provided that where in any such city the exclusive control of any street, road, highway or avenue which is to be used or occupied by any railway or railways constructed under the provision of

this act, is by law, vested in any local authority other than the common council of such city, the approval of the aforesaid plans and conclusions and the consent to the construction of a railway thereunder shall be given by such local authority in place of and if required in addition to such approval and consent by said common council and with like effect. Upon obtaining the approval and consent of the local authorities as above provided, the said Board of Rapid Transit Railroad Commissioners shall also, unless such approval and consent of local authorities shall have been refused, take the necessary steps to obtain, if possible, the said consents of the property owners along the line of the said route or routes. For the purposes of this act the value of the property bounded on that portion of any street or highway in, upon, over or under which it is proposed to construct or operate such railway or railways, or any part thereof, shall be ascertained and determined from the assessment roll of the city in which the said property is situated, confirmed or completed last before the local authorities shall have given their consent as above provided. If such consents of property owners cannot be obtained, the said board may, in its own name, make application to the General Term of the Supreme Court in the Judicial District in which such railway is to be constructed for the appointment of three commissioners to determine and report after due hearing whether such railway ought to be constructed and operated. Two weeks' notice of such application shall be given by daily publication thereof, Sundays and holidays excepted, in six daily newspapers published in the city where such proposed railway is to be constructed, if there be so many newspapers published in said city, and if not, then in all the daily newspapers published in said city. The newspapers in which said publication shall be made shall be designated by the General Term of the Supreme Court, to which such application is to be made on the application of the commissioners without notice. The

said General Term, upon due proof of the publication aforesaid, shall appoint three disinterested persons who shall act as commissioners, and such commissioners, within ten days after their appointment, shall cause public notice to be given in the manner directed by the said General Term of their first sitting, and may adjourn from time to time until all their business is completed. Vacancies in such commission may be filled by said General Term after such notice to persons interested as the General Term may deem proper, and the evidence taken before as well as after such vacancy occurred shall be deemed to be properly before such commissioners. *The said commissioners shall determine*, after public hearing of all parties interested, *whether such railroad ought to be constructed and operated*, and shall report the evidence taken to said General Term, together with a report of their determination whether such road ought to be constructed and operated, which report, if in favor of the construction and operation of such road, shall, when confirmed by said court, be taken in lieu of the consent of the property owners above mentioned. Such report shall be made within sixty days after the appointment of said commissioners, unless the said court or a judge thereof shall extend such time.

In the

Supreme Court of the United States

October Term, 1902.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK, AND THE METROPOLITAN UNDERGROUND RAILROAD COMPANY,

Appellants,

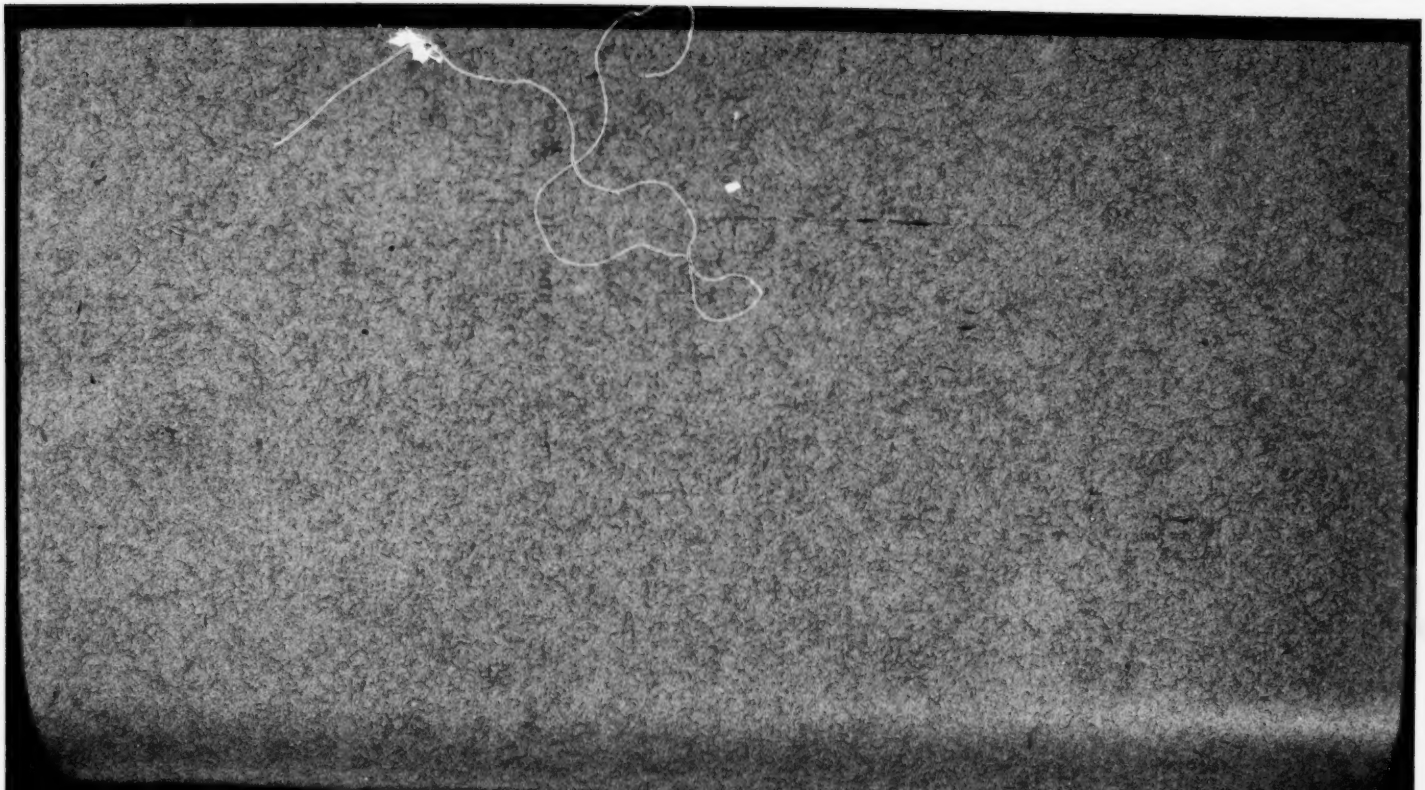
vs.

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, AND THE CITY OF NEW YORK.

EDWARD M. SHEPARD,
Of counsel for respondents,
66 Liberty Street,
New York City, N. Y.



IN THE

Supreme Court of the United States.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and THE RAPID TRANSIT UNDERGROUND RAILROAD CO.,

Appellants,

vs.

THE CITY OF NEW YORK, ALEXANDER E. ORR and others, members of THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS OF THE CITY OF NEW YORK, *et al.*,

Respondents.

No. 489.

October, 1902.

Mem. for Respondents upon Appellants' Motion to Advance Cause.

The respondents concur with the appellants in the view that this appeal should be orally heard. It involves other questions than a jurisdictional one. But the defendants feel bound to submit to the Court that the papers present no sufficient reason that the cause should be advanced. They submit that no public interest requires the immediate hearing or disposition of the appeal. The affidavits upon which the appellants move refer to the allegations of the bill that the City of New York is insolvent, that the City has already more indebtedness than is authorized by the Constitution of the State of New York; that indebtedness incurred in the construction of the underground or

rapid transit railroad now under construction in the City would be unauthorized and void, and that the City has no means with which to pay for the private property which it proposes to take in the construction of the railroad. The defendants demurred for the reason that they were advised by their counsel that, as the Court below has adjudged, the complainants' bill presented no equity. For that reason it was quite unsuitable that the defendants should have answered and have permitted unnecessary litigation merely for the purpose of a formal denial of allegations entirely insufficient to support a decree. But now that the complainants present to the Court these allegations as a ground for a motion for advancement of the hearing of the suit, the defendants feel constrained upon the motion to submit, as they do submit herewith, the affidavit of Mr. Orr, one of the defendants and the president of the Board of Rapid Transit Railroad Commissioners, and also the affidavit of Mr. Grout, Comptroller of the City, that these allegations are untrue.

The defendants submit that the absence of any cause for exceptional haste is proved by the allegations of the bill itself, which shows that the important rights claimed by the plaintiffs accrued in the years 1881, 1883 and 1885; that the bill herein was not filed until July, 1901, and not until long after the City of New York and its Rapid Transit Board had arranged for the construction of the municipal rapid transit railroad which the complainants have sought in this suit to enjoin, and not until more than a year after such construction had actually begun.

It is, therefore, submitted that the complainants' motion should be denied.

November 28th, 1902.

EDWARD M. SHEPARD,
Of Counsel for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and THE RAPID TRANSIT UNDERGROUND RAILROAD CO.,

Appellants,

vs.

THE CITY OF NEW YORK, ALEXANDER E. ORR and others, members of THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS OF THE CITY OF NEW YORK, *et al.*,

Respondents.

No. 489.

October, 1902.

STATE OF NEW YORK, }
County of New York, } ss.:

ALEXANDER E. ORR, being duly sworn, says: I am one of the defendants and respondents in this cause. I am and have since the year 1894 (except only a few days in May, 1899,) been a member of and President of the Board of Rapid Transit Commissioners. I am personally very familiar with matters of rapid transit in the City of New York and am generally familiar with the situation of the said City. It is not true that the City of New York is insolvent, or that it has more indebtedness than is authorized by the Constitution of the State of New York, or that it proposes to incur additional indebtedness for the construction of its underground or rapid transit railroad or railroads which will be unauthorized or void, or that it has no means with which to pay for the private property which it proposes to take in the construction of the railroad. I am able to make this denial from

my general knowledge of the public situation of the said City and from official reports and statements open to every one. It is an undisputed matter of public knowledge in the City of New York that the City is highly solvent; that its bonds sell regularly and in the public market upon the basis of the very highest degree of solvency; that the obligations issued by the City to pay for the construction of its underground rapid transit railroad sell upon such a basis, and are conceded without dissent by all the principal financial persons and corporations in this City and State to be duly authorized and perfectly valid. The allegations to the contrary are, in my opinion, preposterous. The discussion of the question whether the City of New York has exceeded its debt limit which was had before the Appellate Division and which was referred to in the affidavit of James M. Fisk, Esq., upon which the complainants' present motion is made, took place not with reference to the present City of New York, but with reference to the former City of New York, and with reference to a time when the debt incurring capacity of the former City was far less than the present debt incurring capacity of the City.

Sworn to before me, this 29th day of November, 1902.

A. E. Orr

Seymour K. Fuller
Notary Public Kings Co.
Cert. filed in N.Y. Co.
[Notarial Seal]

IN THE

SUPREME COURT OF THE UNITED STATES.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and THE RAPID TRANSIT UNDERGROUND RAILROAD Co.,

Appellants,

vs.

THE CITY OF NEW YORK, ALEXANDER E. ORR and others, members of THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS OF THE CITY OF NEW YORK, *et al.*,

Respondents.

No. 489,

October, 1902.

STATE OF NEW YORK, }
County of New York, } ss.:

EDWARD M. GROUT, being duly sworn, says: I am the Comptroller of the City of New York and am the offi
Bird S. Coler, formerly the Comptroller of t
York, one of the defendants herein. As s
of the Board of Rapid Transit Railroad Commissioners of the said City, I am personally very familiar with matters of rapid transit in the City of New York and am generally familiar with the situation of the said City. It is not true that the City of New York is insolvent, or that it has more indebtedness than is authorized by the Constitution of the State of New York, or that it proposes to incur additional indebtedness for the construction of its underground or rapid transit railroad or railroads which will be unauthorized or void, or that it has no means with which to pay for the private property which it proposes to take in the construction of the railroad. I make this denial

upon my general knowledge of the public situation of the said City and upon the information I have as Comptroller of said City. It is an undisputed matter of public knowledge in the City of New York that the City is highly solvent; that its bonds sell regularly and in the public market upon the basis of the very highest degree of solvency; that the obligations issued by the City to pay for the construction of its underground rapid transit railroad sell upon such a basis, and are conceded without dissent by all the principal financial persons and corporations in this City and State to be duly authorized and perfectly valid. The allegations to the contrary are in my opinion preposterous. The discussion of the question whether the City of New York has exceeded its debt limit which was had before the Appellate Division and which was referred to in the affidavit of James M. Fisk, Esq., upon which the complainants' present motion is made, took place not with reference to the present City of New York, but with reference to the former City of New York, and with reference to a time when the debt incurring capacity of the former City was far less than the present debt incurring capacity of the City.

Sworn to before me, this 29th day of November, 1902. } Edward M. Grout

Seymour K. Fuller
Notary Public, Kings Co.
Cert. filed in N.Y. Co.
[Notarial seal]

13799

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK AND THE RAPID TRANSIT UNDERGROUND RAILROAD CO.,
Appellants,

VERSUS

THE CITY OF NEW YORK, ALEXANDER E. ORR AND MEMBERS OF THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK AND OTHERS,
Respondents.

No. 489.
October, 1902.

The defendants-respondents respectfully object to the submission of this appeal to the Court without oral argument. They submit that the order made by the Court on 8th December, 1902, does not permit such a submission without their assent. That order was as follows:

> "On consideration of the motion to advance this case for oral argument,
>
> "It is Now Here Ordered by the Court that said motion be and the same is hereby, denied, but leave is hereby granted to submit the cause on the question of jurisdiction as under the 32d rule, if counsel shall be so advised."

The respondents respectfully insist that, under this order the cause may not be submitted without argument, unless their counsel shall be so advised and shall assent,—and that, as their coun-

sel do not assent, and are not so advised, the cause should stand for argument in regular order, and that the present application of the complainants-appellants should be denied.

The question of the jurisdiction of the court below, involves the entire merit of the controversy. The complainants and defendants were all citizens of the State of New York. The complainants sought by their bill to invoke the protection of the federal constitution, upon the claim that the rapid transit act of the State of New York, impaired the obligation of a contract claimed to exist between the complainants and the City of New York. The Circuit Court held that it did not appear that the complainants had a legal contract subject to impairment or that there was any ground to believe that such a legal contract had been impaired.

The contention of the defendants was that it did not appear upon the face of the complainant's bill that there was any such contract or that there had been any effort to impair the obligation of any such contract. The Circuit Court held with the defendants, and dismissed the bill because, in the absence of allegations tending to establish such a contract or such impairment of contract, that court was without jurisdiction.

This case is one of unusual importance, for it not only involves the validity of the scheme for the construction of the Rapid Transit Rail-

way in the City of New York,—a vast work now approaching completion,—but it also involves the constitutionality of the law under which this municipal railway and all future extensions must be built.

This Court will perceive that the question of jurisdiction which has been certified, cannot be presented except as the entire merits of the controversy are presented. In such case it is submitted that the defendants ought not to be asked, and cannot be required, to forego the advantage of an oral presentation of their cause. They are advised that they have a right to such a presentation and upon that right they respectfully insist.

If the Court, however, should differ from this view of the defendants, the latter respectfully ask for such time as may be proper to submit their argument upon the questions presented to the Court.

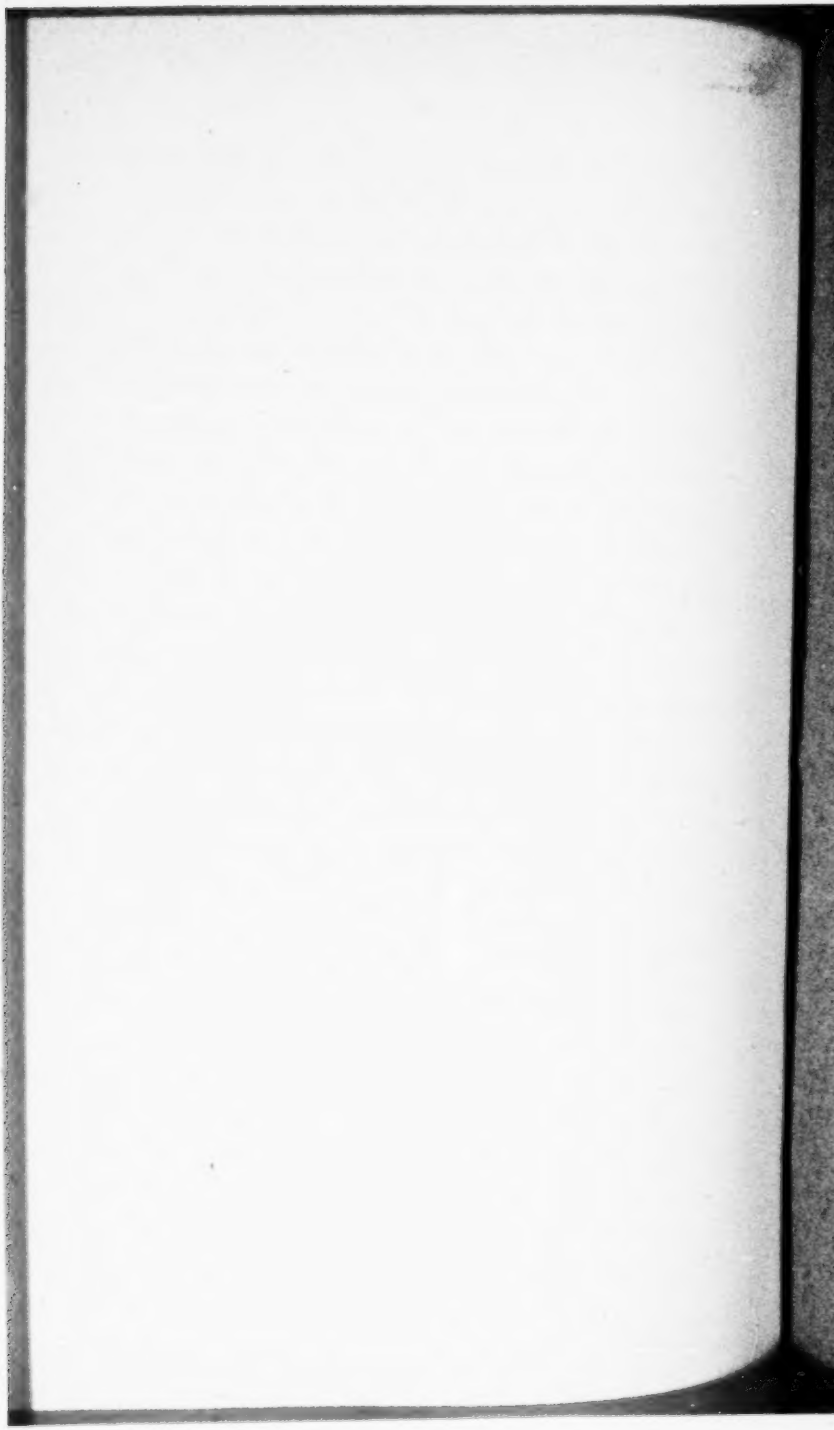
DATED APRIL 20TH, 1903.

G. L. RIVES,
Corporation Counsel.

GEO. W. WICKERSHAM,
DE LANCEY NICOLL,
EDWARD M. SHEPARD,
Of Counsel for Respondents.

DEFENDANT'S

BRIEF



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No. 13503

FILED

JAN 8 1904

JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK AND THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY, *Complainants, Appellants,*

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, INDIVIDUALLY AND AS MAYOR OF THE CITY OF NEW YORK, BIRD S. COLER, INDIVIDUALLY AND AS COMPTROLLER OF THE CITY OF NEW YORK, ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH AND MORRIS K. JESUP, INDIVIDUALLY AND AS MEMBERS OF THE PRETENDED BOARD OF RAPID TRANSIT COMMISSIONERS OF THE CITY OF NEW YORK, JOHN B. McDONALD AND THE RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY, *Defendants, Respondents.*

BRIEF FOR DEFENDANTS, RESPONDENTS, THE CITY OF NEW YORK AND OTHERS.

GEORGE L. RIVES,
Corporation Counsel,
Solicitor for Defendants, Respondents, The City of New York, Robert A. Van Wyck, individually and as Mayor of The City of New York, Bird S. Coler, individually and as Comptroller of The City of New York.

THEODORE CONNOLY,
Of Counsel.

(7312) MARTIN B. BROWN CO., Printers and Stereotypers, 49 to 55 Park Place, New York.

Supreme Court of the United States.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK, and the RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,
Complainants-Appellants,

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, individually and as Mayor of the City of New York; BIRD S. COLER, individually and as Comptroller of the City of New York; ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH and MORRIS K. JESUP, individually and as members of the pretended Board of Rapid Transit Commissioners of the City of New York, JOHN B. MCDONALD, and the RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
Defendants-Respondents.

Brief for Defendants-Respondents, The City of New York, Robert A. Van Wyck, individually and as Mayor of the City of

New York, and Bird S. Coler, individually and as Comptroller of the City of New York.

STATEMENT.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York dismissing an amended bill in equity for want of jurisdiction.

The bill as amended prayed an injunction against the construction and operation of an underground railroad and subway on Manhattan Island, in the City of New York, upon a route to which the complainants claimed to have a prior exclusive right, and also against the payment by the defendants, who are municipal officers, of any money under chapter 4 of the Laws of 1891 of the State of New York, the Rapid Transit Act, to the defendants, John B. McDonald and the Subway Construction Company, or to any one, and against the issuing of bonds or stock of the City of New York under the Rapid Transit Act, or to obtain money to aid in the construction of such underground railroad; and for a receiver to take possession of so much of the underground railroad as is already constructed. The bill also contains the prayer for general relief under which it is stated by complainants in their brief a decree might be granted, compelling the payment of the value of the complainants' franchises, in lieu of an injunction.

The real object of the entire action is disclosed on page 107 of complainants' brief, as follows:

> "It may be, however, that upon the final hearing after proofs have been taken, the Court will not give us all this relief, but will direct that upon the payment of the value of our franchise an injunction be withheld."

In other words, the action is really one to compel defendants to purchase the alleged rights of complainants.

As the co-defendants-respondents in this action, other than the City of New York and its municipal officers, will file a very full brief upon this hearing, it will not be necessary for the present defendants-respondents to do more than generally join in the brief of their co-defendants-respondents and to ask that it may be availed of by these defendants-respondents, and in addition thereto these defendants-respondents desire to briefly set forth in this memorandum-brief a few considerations which, in their opinion, should dispose of the appeal.

For the reasons already stated it will not be necessary to here repeat at length the allegations of the bill of complaint which are well summarized in the opinion of Judge Hazel and which are also given in the brief for the codefendants-respondents already mentioned.

After the filing of the bill, demurrers were interposed by the various respondents-defendants (pp. 44–47, Record), which, among other things, alleged that it appeared upon the face of the bill that the Court was without jurisdiction in the premises in that the matter in dispute did not arise under the Constitution or laws of the United States, and also that no case was stated in the bill as amended authorizing the relief sought or any other relief.

These demurrers were sustained by the District Judge (whose opinion appears at page 52), at the Circuit Court, and the bill of complaint as amended was dismissed for want of jurisdiction upon the ground that the Circuit Court had no jurisdiction of the same (p. 61, Record).

Thereafter a certificate was made (Record, p. 62), by the Circuit Court certifying to this Court the decree entered herein, which is in part, as follows:

> "And this Court further certifies that in said suit the jurisdiction of this Court is in issue; and it further certifies to the Supreme Court of the United States said question of jurisdiction raised by said demurrers to said amended bill in equity as follows:
>
> "1. When a circuit court of the United States decides that a complainant to a bill of equity brought to enforce an alleged right which he claims arises under the Constitution of the United States shows no right arising under the Constitution of the United States, has said Court jurisdiction to decide and hear and determine other matters of equitable cognizance pleaded in said bill, which did not arise under either the Constitution of the United States or a statute, or a treaty thereof; if the complainant and defendant are citizens of the same state?
>
> "2. Has the Court jurisdiction of the said amended bill in equity?"

The assignment of errors is found at page 65 of the Record, and also at page 14 of the Brief of Complainants-Appellants.

In addition to the matters set forth in the brief of their co-defendants-respondents herein, the defendants-respondents, the City of New York and its officers, respectfully present the following points:

I.

A complainant who alleges that the Circuit Court of the United States has jurisdiction of a controversy by reason of the infringement of a right of complainant under the Constitution of the United States, must show that such right is a real one.

Of the two questions certified to this Court, it is supposed that the more important is the second one, namely, "Has the Court jurisdiction of the said amended bill in equity?"

Such jurisdiction being claimed by reason of the existence of a right of the complainants under the Constitution of the United States, to give jurisdiction upon this Court, complainants must show that they have a real existing right, or at least that they claim such right in good faith.

It was said by this Court, in a well-known case:

> "Before we can be asked to determine whether a statute has impaired the obligation of a contract it should appear that there was a legal contract subject to impairment and some ground to believe that it has been impaired; and that to constitute a violation of the provision against depriving any person of his property without due process of law, it should appear that such person has a property in the particular thing of which he is alleged to have been deprived."
>
> New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 79, 88.

It is claimed by complainants-appellants that the rule, as laid down in the case just cited, does not apply to suits brought in the United States Courts, and they

cite in favor of this contention a recent case in the Circuit Court, Southern District of California, Riverside and A. Ry. Co. *vs.* City of Riverside, 118 Fed. Rep., 736, which holds that it is sufficient if the impairment or deprivation of contract rights *is claimed in good faith and not frivolously*, even though it should appear that there is no real and valid contract.

And the District Judge in that case quoted from the opinion of this Court in City Ry. Co. *vs.* Citizens' St. R. Co., 166 U. S., 558, as follows:

> "All that it is necessary to establish the jurisdiction of the Court is to show that the complainant had claimed in good faith to have a contract with the City which the latter had attempted to impair."

This subject of jurisdiction has, of course, been frequently considered by this Court.

It was said in a well-known case, which arose in the Circuit Court, and in which the jurisdiction was invoked on two grounds, that the case arose under the Constitution, and also that there was diverse citizenship:

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, *upon the determination of which the result depends, then it is not a suit arising under the Constitution* (Shreveport *vs.* Cole, 129 U. S., 36; Starin *vs.* New York, 115 U. S., 248, 257; Gold Washing and Water Company *vs.* Keyes, 96 U. S., 199).
>
> "The judicial power extends to all cases in law and equity arising under the Constitution, but these are *cases actually and not potentially arising, and jurisdiction cannat be assumed on mere hypothesis.* In this class of cases it is necessary to the

exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the Constitution, and it is readily seen that cases in that predicament must be rare."

New Orleans *vs.* Benjamin, 153 U. S., 411, 424.

In a later case this Court said:

"We cannot accede to the proposition that because the acts of Congress, which authorized the construction of the bridge in question, gave the right to build a railroad and toll bridge, the conceded power of the State to tax did not extend to the bridge in both aspects. Nor can we agree that the making of such a contention raised a Federal question of a character to confer original jurisdiction in the Circuit Court of the United States. *Not every mere allegation of the existence of a Federal question in a controversy will suffice for that purpose.* There must be a real substantive question, on which the case may be made to turn.';

St. Joseph & Grand Island R'd *vs.* Steele, 167 U. S., 659, 662.

In a still later case it was said:

"It is * * * quite plain that the complainants base their case upon the allegation that their property is about to be taken from them by the City authorities without due process of law and in violation of the Constitution of the United States, because the Act of 1890 violates the Constitution of Iowa. That is a question of law, depending for its solution upon the law of Iowa, and as to what that law is, the Federal courts are bound in such a case as this by the decision of the State tribunal. There is no construction of the Federal

Constitution involved in that inquiry, nor any question as to its effect upon the complainants' rights in this suit. The question whether their property is taken without due process of law must be decided with sole reference to the law of Iowa. How can it be said upon such facts that any question arises under the Constitution or laws of the United States? The claim of the complainants will not be defeated by one construction of that clause in the Constitution or sanctioned by the other (Starin *vs.* New York, 115 U. S., 248). There is no dispute about construction in any way whatever; the only question is as to the validity of the City organization, which, as stated, is a matter of State law."

McCain *vs.* Des Moines, 174 U. S., 168, 176.

And quite recently this Court again considered the question, saying:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or Laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground."

Western Union Tel. Co. *vs.* Ann Arbor Rd. Co., 178 U. S., 239, 243.

And in the latest case, of which is one apparently relied upon by complainants-appellants in their brief, it is said:

> "It has been repeatedly held that, on error from a State Court to this Court, where the Federal question asserted to be contained in the record is manifestly lacking all color of merit, the writ of error should be dismissed. New Orleans Water Works Co. *vs.* Louisiana, ante, 336, and authorities cited. * * * And *it is true also, as observed in New Orleans Water Works Co.* vs. *Louisiana, supra, that a similar principle is applied in analogous cases originally brought in a Court of the United States.* McCain *vs.* Des Moines, 174 U. S., 168; St. Joseph and Grand Island Railroad *vs.* Steele, 167 U. S., 659. But the doctrine referred to has no application to a case brought in a Federal Court where the very subject matter of the controversy is Federal, however much wanting in merit may be the averments which it is claim establish the violation of the Federal right."
>
> Swafford *vs.* Templeton, 185 U. S., 487, 493.

The five cases just cited arose in the United States Courts.

It is submitted that the allegations of the present bill of complaint cannot stand the test conceded by complainants' brief to be the correct one, even in cases brought in the United States Courts.

The result of the authorities is that even in cases brought in the Federal Courts there is no jurisdiction unless it shall appear that the complainant claims *in good faith* and not frivolously to have a right under the United States Constitution which has been impaired.

Applying to the allegations of the bill of complaint, therefore, the test suggested in the case last cited, whether or not the question asserted to be raised is manifestly lacking of color of merit, and whether a Federal question is *bona fide* raised, we will now proceed to consider the allegations in question.

II.

The bill of complaint shows that a Federal question is not involved, because it shows on its face that complainants have no contract right under the Constitution of the United States.

The principal claim of complainants-appellants is based upon rights declared to have been derived from The Central Tunnel Railway Company, a corporation stated to have been incorporated under the General Railroad Law of the State of New York, chapter 140 of the Laws of 1850, and which is alleged to have acquired the right of construction under another statute, chapter 582 of the Laws of 1880 of that State, entitled "An Act to provide for excavating and tunneling and bridging for transportation purposes within the cities and villages of this State."

The last-mentioned act was passed as a supplement to the General Railroad Act, and its privileges can only be availed of by corporations incorporated under the General Railroad Act or under some special act. (Laws of 1880, chapter 582, section 1.)

It being distinctly claimed by complainants that their predecessor was incorporated under the General Railroad Act of 1850 and obtained additional privileges under chapter 582 of the Laws of 1880 (see

Article of Association of the Central Tunnel Railway Company, pages 36–38 of Record), it becomes necessary to ascertain whether they have obtained the right of construction claimed by them under the acts in question.

The first requisite to the obtaining of rights of construction by complainants' predecessor, the Central Railway Tunnel Company, was a compliance with section 18 of Article 3 of the Constitution of the State of New York of 1846, as amended in 1874, which, so far as relevant, is as follows:

> "No law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on the line, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad being first obtained, or in case the consent of such property-owners cannot be obtained, the General Term of the Supreme Court in the district in which it is proposed to be constructed may, upon application, appoint three commissioners, who shall determine, after a hearing of all the parties interested, whether such railroad ought to be constructed or operated, and their determination confirmed by the Court may be taken *in lieu of the consent of the* PROPERTY-OWNERS."

It is to be noted that the action of the Supreme Court Commissioners, under this section, merely takes the place of that of the property-owners, leaving the consent of the municipal authorities to be still obtained before the right of construction is perfect.

Section 1 of chapter 582 of the Laws of 1880, under which the Central Tunnel Railway Company claims

its right of construction, is, so far as relevant, as follows:

> "Whenever such road, or any part of the same, is intended to be built within the limits of any city or incorporated village of this State and to run by means of a tunnel underneath any of the streets, roads or public places thereof, the said company, before building the same underneath any of said streets, roads or public places, shall obtain the consent of the owners of one-half in value of the property bounded on the line, and the consent of the board of trustees of the village by resolution adopted at a regular meeting and entered on the records of said board, and of the proper authorities having control of said streets, roads or public places; or in case such consent of the owners of property bounded on the line cannot be obtained, the general term of the supreme court in the district in which such city or village is situated, may upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be allowed to be built underneath said street, roads and public places, or any of them * * * and the determination by said commissioners, confirmed by the court, may be taken in lieu of the consent *of said authorities and property-owners.*"

It was held by the Court of Appeals of the State of New York that the act of 1880 just mentioned authorized and regulated underground street railways, and the Court further held that a railway confined within the limits of a city and proposed to be built exclusively under the surface of the ground, was a street railway within the meaning of the State Constitution, article 3, section 18, in regard to consents by the property-owners and municipal authorities.

And the Court of Appeals in the case referred to (Matter of N. Y. District R. R. Co., 107 N. Y., 42), discussed at length the reasons why such an underground road is a street railway and within the terms of the section and article of the Constitution mentioned.

And the Court squarely held that the provisions of the Act of 1880, *just cited, which allowed the action of the Supreme Court Commissioners to stand in the place of the consent of the municipal authorities were unconstitutional.*

It is submitted that this ruling is fatal to any rights of construction claimed by complainants as successors of the Central Tunnel Railway Company.

But the Central Tunnel Railway Company did not go so far as to obtain action by the Supreme Court Commissioners. It obtained the appointment of Commissioners and did nothing more.

We have, then, the case of a corporation claiming a right of construction of a railroad under an unconstitutional statute, under which it took no complete action.

An examination, therefore, of the bill of complaint in the action shows that the complainants are not making a claim *in good faith* that a Federal question is involved, because no question, Federal or otherwise, is involved, owing to the fact that they have never acquired any right, nor has their predecessor, the Central Tunnel Railway Company, ever acquired any right, to construct a railway under the streets of New York on the route indicated in the bill of complaint.

It cannot be said that a right is claimed *in good faith* where, on the face of the pleading, read in connection with the statutes of the State, it is shown that

the party making the claim has no right whatever to any relief in any court.

For the reason that the very foundation of the complainants' claim is shown not to exist, they cannot ask for any action of the Court upon the ground that a Federal question is involved.

III.

The Central Tunnel Railway Company, the predecessor of complainants, never had any legal existence.

Another fatal objection to the alleged rights of complainants-appellants is that their predecessor, the Central Tunnel Railway Company, never had any legal existence.

As has been shown, that company was alleged to be incorporated under the General Railroad Act of the State, chapter 140 of the Laws of 1850, and claimed to have derived its right of construction from the so-called Tunnel Act, chapter 582 of the Laws of 1880 (Record, pp. 36–38).

The purpose of the incorporation is stated to be the construction of an underground railroad *in the City of New York* on a route in the articles of association specifically set forth.

The fatal difficulty as to this is that at the time of the attempted incorporation of the Central Tunnel Railway Company there could not legally exist a corporation having for its corporate purposes the construction of a street railroad in the City of New York.

That an underground railroad such as that projected by the Central Tunnel Railway Company is a street railroad has been decided, as already shown, by the Court of Appeals, in Matter of N. Y. District R. R. Co., 107 N. Y., 42, already cited.

At the time of the attempted incorporation of the Central Tunnel Railway Company (March 26, 1881), and at the time of the order made by the General Term of the Supreme Court for the appointment of Commissioners (February 2, 1883), there was in force an act, chapter 10 of the Laws of 1860, entitled "An Act relative to railroads in the City of New York" which was as follows:

> "Section 1. It shall not be lawful hereafter to lay, construct or operate any railroad in, upon or along any or either of the streets or avenues of the City of New York wherever such railroad may commence or end, except under the authority and subject to the regulations and restrictions that said legislature may hereafter grant and provide" * * * .
>
> "Section 3. This act shall take effect immediately."

This act is positive in terms and has been construed by the New York Courts exactly in accordance with its plain provisions.

> Matter of Washington Street A. & P. R. R. Co., 115 N. Y., 442.
> Matter of People's Rapid Transit Co., 125 N. Y., 93.

The law as laid down in these cases is that street railroads could not, after the passage of the statute of 1860, be constructed under the General Railroad Act of 1850 and its amendments in the City of New York,

and that no authority for the construction of such a road existed in that City from the time of the passage of the Act of 1860 down to the time of the passage of chapter 252 of the Laws of 1884, entitled "An Act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages."

It was said in one of the cases cited, per PECKHAM, *J.*:

> "In regard to that city "(New York)" it is admitted that the General Railroad Law has now no application, for by chapter 10 of the Laws of 1860 it was made unlawful to thereafter lay, construct or operate a railroad in New York City except under the authority of the Legislature to be thereafter granted. The remark of Judge Rapallo in the first cited case "(New York Cable Company *vs.* The Mayor, 104 N. Y., 1)," that up to the time of the passage of the General Surface Street Railroad Act of 1884 there had been no law in force under which street railroads could be constructed except the Rapid Transit Act, the General Railroad Act of 1850 being inapplicable to street railways in cities, was not exactly accurate if applied to all the cities in the State, but was in entire accord with the truth in regard to the particular city "(New York)" which he was writing about and in which the corporation existed whose rights were then under review. The inclusion of the other cities of the State was not in any way material to his argument and was probably a mere inadvertent expression of the learned Judge, the important fact being that the General Railroad Act of 1850 did not apply to street railways in the City of New York."
>
> Matter of Washington Street A. & P. R. R. Co., 115 N. Y., 445, 446.

(The Rapid Transit Act referred to in the opinion of Judge Peckham is the Elevated Railroad Act, chapter 606 of the Laws of 1875, which had and could have no reference to a corporation attempting to be incorporated under the General Railroad Act to exercise powers quite other and different from those provided for in the Act of 1875.)

(No claim is made by the complainants that the predecessor, the Central Tunnel Railway Company, could avail itself of any other rights conferred by the Elevated Railroad Act of 1875.)

We have, therefore, not only the facts set forth in the preceding point, that the Central Tunnel Railway Company never complied either with the Constitution or the Laws of the State of New York, but also that its attempted incorporation was absolutely nugatory, for the reason that the object of its corporate life was one prohibited by the statute, chapter 10 of the Laws of 1860.

And a citation of cases is unnecessary to support the proposition that there cannot be valid incorporation for purposes positively forbidden by express statute.

The Central Tunnel Railway Company, therefore, never had any legal existence.

IV.

Any possible rights of complainants' predecessor have lapsed.

Even if the Central Tunnel Railway Company ever had a corporate existence, that corporate existence has ceased.

It appears by Exhibit "A," attached to the bill of complaint, which is the Articles of Association of the Central Tunnel Railway Company, that it was organized under the General Railroad Act of 1850, chapter 140 of that year, and that it obtained the right of construction under a supplemental act, chapter 582 of the Laws of 1890.

It is provided by chapter 775 of the Laws of 1867 of the State of New York, as follows:

> "Section 1. If any corporation formed under an act entitled 'An act to authorize the formation of railroad corporations and to regulate the same,' passed April two, eighteen hundred and fifty, shall not, within five years after the articles of association are filed and recorded in the office of the secretary of state, begin the construction of its road and expend thereon ten per cent. of the amount of its capital, or shall not finish its road and put it in oporation in ten years from the time of filing its articles of association as aforesaid, *its corporate existence and powers shall cease.*"

It appears from the bill of complaint (Record, page 38), that the Articles of Association of the Central Tunnel Railway Company were filed and recorded in the office of the Secretary of State, March 26, 1881; therefore under the terms of the act just quoted, it should, to save its corporate existence and powers, have begun the construction of its road and expended thereon ten per cent. of the amount of its capital within ten years thereafter.

There is no allegation in the complaint that it ever began the construction of its road or expended ten per cent. of its capital, namely, ten per cent. of five million dollars within the ten years or at any other time.

It is very apparent that the intention of the statute was to cure the evil so well illustrated by this suit,

namely, the existence of paper corporations which do no work whatever except to stand in the way and to prevent public improvement unless they are bought off.

That the failure specified in the section just quoted is self-executory has been held by the Court of Appeals of the State of New York in the following cases:

Matter of B. W. & N. R. R. Co., 72 N. Y., 245.

Matter of B. W. & N. R. R. Co., 75 N. Y., 335, 337.

Brooklyn Steam Transit Company *vs.* City of Brooklyn, 78 N. Y., 524.

It is, of course, true that in different jurisdictions throughout the country very different effect has been given to statutes forfeiting the charters of corporations, but in the present case, we have language as plain as language can be made, that in the event stated, the "*corporate existence* and power *shall cease*," and this plain provision has been construed, as has been stated, by the Court of Appeals of the State, in accordance with its terms.

It has been stated in the brief of complainants-appellants that two of the cases just cited have been practically overruled.

So far from this being the case, they have been distinctly recognized as sound when applied to the statute in question, by subsequent cases in the Court of Appeals.

Matter of Brooklyn Elevated R. R. Co., 125 N. Y., 434–441.

Matter of New York and Long Island Bridge Co., 148 N. Y., 540–547,

in which last case it is said:

> "The question as to whether a forfeiture clause is or is not self-executing depends wholly upon the language employed by the Legislature" (148 N. Y., 547).

Some kind of claim is apparently made in the brief of complaints-appellants that the transfer of the alleged rights of the Central Tunnel Railway Company to its successors in some way gave those rights a longer lease of life, but this, of course, is not so, for a corporation cannot prolong the life of its franchises by transferring them to another corporation.

Matter of Brooklyn W. & N. R. R. Co., 81 N. Y., 69.

V.

The Rapid Transit Act is constitutional.

If, as has been heretofore shown, complainants' predecessor had no legal existence at the time of the commencement of the suit, nor any contract rights whatever, the attack made on the Rapid Transit Act, chapter 4 of the Laws of 1891, on the ground of unconstitutionality, will not avail them.

The fact is, however, that this act has been declared to be constitutional by the Court of Appeals of the State of New York.

Sun Publishing Company *vs.* The Mayor, 152 N. Y., 257.

(The citations at pages 37–43 of complainants' brief of extracts from opinions in the Appellate Division in the Sun Publishing case are from dissenting opinions).

VI.

The rights claimed by complainants otherwise than through The Central Tunnel Railway Company.

Only the alleged rights of complainants-appellants claimed by them as successors of The Central Tunnel

Railway Company have been discussed in this brief, because the principal claim of these complainants-appellants is made as successors to that alleged corporation.

The New York and New Jersey Tunnel Railway Company and The Terminal Underground Railway Company were two other paper corporations organized under the same act as The Central Tunnel Railway Company, but they have done absolutely nothing.

Besides this, the first-named was attempted to be incorporated at a time (January 2, 1883) when a street railroad could not organize for operation in the City of New York for the reasons stated in Point 2 hereof.

VII.

The first question certified.

It has seemed to defendants-respondents that if the second question certified is answered in the negative, there is nothing left to the case.

And it would seem that an analysis of the first question will show that it is not open to any very serious discussion.

What it really means is that if when a party comes in the Circuit Court claiming an alleged right under the Constitution, it should turn out that he has no such right at all, can that Court entertain jurisdiction to hear and determine other matters of equitable cognizance pleaded in the bill, which are not Federal questions at all; or, in other words, if when the essential ground of jurisdiction has fallen, can the Court go on and determine questions which are not Federal and therefore are not within its jurisdiction.

It seems to defendants-respondents, as has been said, that this appeal should be disposed of upon a consideration of the second question certified, and these defendants-respondents have confined themselves to a brief analysis of what they regard as the fundamental question in the case.

VIII.

The decree should be affirmed and the certified questions answered in the negative.

Many other reasons might be advanced in support of the decree below, but it is believed that the foregoing considerations briefly set forth, taken in connection with the points made by the co-defendants-respondents of the present defendants-respondents, are amply sufficient to sustain the decree upon the ground that the Circuit Court had no jurisdiction, and the questions certified should be answered in the negative.

Respectfully submitted,

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Corporation Counsel,

Solicitor for defendants-respondents, The City of New York, Robert A. Van Wyck, individually and as Mayor of The City of New York; Bird S. Color, individually and as Comptroller of The City of New York, defendants-respondents.

THEODORE CONNOLY,
Of Counsel.

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Supreme Court of the United States.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK, AND THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,

Appellants,

vs.

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK *et al.*,

Appellees.

No. 150.
OCTOBER TERM, 1903.

BRIEF FOR THE APPELLEES, THE RAPID TRANSIT BOARD, ITS MEMBERS, THE RAPID TRANSIT SUBWAY CONSTRUCTION CO. AND JOHN B. McDONALD.

EDWARD M. SHEPARD,
GEORGE W. WICKERSHAM,
DE LANCEY NICOLL,
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New York City, N. Y.

[18717]

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903,—No. 150.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,
Complainants-Appellants,

vs.

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS, *et al.*,
Defendants-Appellees.

Brief for the Appellees, The Rapid Transit Board, its Members, the Subway Construction Company, and others.

Appeal from a decree of the Circuit Court of the United States for the Southern District of New York dismissing the complainants' bill for want of jurisdiction.

The City of New York is building a rapid transit railroad under some of its streets at a cost of $36,500,000 (Bill *p.* 29). The work has long been under construction (*p.* 31). It is prosecuted by the City under rapid transit legislation of the State of New York, through the agency of the Rapid

Transit Board of the City acting for it and of a contractor acting under a contract made between him and the Board (*pp.* 28, 29).

The complainants filed their bill in the Court below to enjoin continuance of this great public work and to obtain a receiver of the enterprise (*pp.* 34-35). Their bill includes much legal discussion, many quotations or citations of constitutional and statutory provisions, and also long and various quotations from opinions of lawyers and of courts, some of the latter being dissenting opinions. It is nearly, if not quite, as much a brief of law as it is a bill in equity. The relief was sought upon allegations which, it is claimed, showed—

1. That the complainants had an exclusive right under a contract with the State of New York, to the use for underground railroad purposes of the streets now sought to be used by the City for its own municipal rapid transit road (*pp.* 8, 13, 28).

2. That the municipal construction, and also the legislation of the State which authorized it, were in violation of such contract between the State and the complainants (*p.* 32).

3. That such rapid transit legislation violated the constitution of the State (*pp.* 14-28), and that the contract made by the defendants constituting the Rapid Transit Board acting for the City in the construction of the municipal road, was void (*p.* 30), because there was no authority for it other than such leg-

islation. Also that such legislation was void as in conflict with the fourteenth amendment of the federal constitution (*p.* 32).

4. That such contract was made improvidently and collusively and to the waste of public funds and property (*pp.* 28-30),—all of which the complainants asserted as tax-payers rather than because of their alleged exclusive rights. In addition to their claims to an injunction in support and defense of the exclusive right under the fancied contract which they asserted,—they sought as such tax-payers to enjoin the further continuance of such municipal work.

All the parties to the suit were citizens of the State of New York (*pp.* 3-4); and federal jurisdiction was claimed solely on the ground that the State,—by its authorization of the municipal construction for the City of New York of a rapid transit railroad in the streets included in the complainants' route,—was violating contract and exclusive rights of the complainants. The complainants' supposed contract rights are described in paragraphs I-VII of the bill at pp. 4-18, and in paragraphs IX-X at p. 25. Disentangling the essential facts, from the mass of argument, the nature of their claim is simple. The rights claimed consist of:

FIRST:—An asserted right of the Central Tunnel Railway Company (which we shall call the *Central Company*) to construct and maintain

a tunnel railroad. The right is claimed to have been created in the years 1881, 1882 and 1883, merely by incorporation under the general railroad law and the so-called tunnel law of the State, and by filing a map and profile of its route. The bill alleged that no railroad had been commenced under such asserted right, and imputed the delay of the Central Company to laches of the Supreme Court of the State and to acts of the defendants (*p.* 8). Such acts of the defendants were later in the bill (paragraphs XIII-XX at *pp.* 26-33) alleged to have been committed under, and subsequent to the enactment of, the rapid transit act, being chap. 752 of the laws of New York of 1894. The physical acts of the defendants in their rapid transit construction are alleged (*pp.* 28-29) to have taken place after 24th February, 1900. So that the right, if there were any, of the appellants under the Central Company was not actually interfered with by the defendants for upwards of sixteen years after the supposed right is claimed to have been complete. During those years nothing was done under such supposed right.

SECOND.—An asserted right of the complainant, the Underground Railroad of the City of New York (which we shall call the *Underground Company*), set out in paragraph V at *pp.* 10-12. That company was a consoli-

dated corporation into which were merged the Central Company and two other companies whose lines were said to continuously connect with its line. The consolidation was effected on 6th October, 1896; and at that time a tax of one-eighth of one per cent. upon the amount of its capital stock was paid to the treasurer of the State of New York in pursuance of its tax law, chap. 908 of the laws of 1896 (*p.* 11). On 10th June, 1897, the Underground Company filed a map and profile of its routes (*p.* 12). The complainants claimed that it was vested with the right of the Central Company by the consolidation and gained a new right of its own by such payment of tax and filing of a map and profile.

THIRD:—An asserted right of the complainant, the Rapid Transit Underground Railroad Company, which we shall call the *Complainant Rapid Transit Company*. It is alleged to have been incorporated on 9th April, 1897, under the general railroad laws of New York, and in pursuance of the tax laws already mentioned, to have paid to the treasurer of New York on 10th April, 1897, the sum of $125, being one-eighth of one per cent. upon its capital stock. On 11th October, 1897, the Company is alleged to have filed a map and profile of its route. Such incorporation, payment of tax and filing of map and profile make up the sole support alleged for this claim.

The asserted right of the Central Company having passed in consolidation to the Underground Company, the latter is alleged, on the 29th April, 1897, to have leased its road and routes to the complainant Rapid Transit Company in April, 1897 (*p.* 14).

The defendants demurred to the bill (1) on the ground that the Court below was without jurisdiction in that the matter in dispute did not arise under the Constitution or laws of the United States, and (2) for want of equity, and (3) because the bill was multifarious, and (4) for laches (*pp.* 44-51).

The court below sustained the demurrers and entered a decree dismissing the bill for want of jurisdiction (*p.* 61).

The court below certified to this Court (*p.* 62) that in the suit the jurisdiction of the court was an issue; and it further certified to this Court two questions of jurisdiction which were recited to have been raised by the demurrers, and which were as follows (*p.* 62):

1. "*When a Circuit Court of the United States "decides that the complainant to a bill of "equity brought to enforce an alleged "right which he claims arises under the "Constitution of the United States shows "no right arising under the Constitution "of the United States, has said Court jur- "isdiction to decide and hear and deter- "mine other matters of equitable cogniz- "ance pleaded in said bill which do not "arise either under the Constitution of the "United States or a statute or a treaty*

"*thereof, if the complainant and defend-*
"*ant are citizens of the same State?*

2. "*Has this Court (the Circuit Court) juris-*
"*diction of the said amended bill in*
"*equity?*"

The latter is obviously the first question to determine.

I.

The court below was without jurisdiction.

FIRST.—Before there can be any jurisdiction there must be a federal question; and here there is no such question, for the matter in dispute did not arise under the Constitution or laws of the United States. Federal jurisdiction is claimed solely on the ground that the complainants have rights founded upon contract between them and the State of New York, and that the state by its Rapid Transit act of 1894 and the defendants by their procedure under that act are violating such contract rights. The bill did not, however, present, nor did it even begin to present, the question of a violation by the State of contract rights. For none of its allegations showed, or tended to show, the existence of any contract between the State and either of the complainants.

It is true that in the bill of complaint there are

many *legal assertions* of contract rights and much learned argument and discussion; but the *facts alleged* do not show, or tend to show, any such right. We do not, for the present, insist, or need to insist, that, if the allegations of the bill called for an examination of the facts or any serious consideration of the law in order to determine whether the right in fact existed, a decision on the merits adverse to the complainants would oust the jurisdiction of the Court. We do submit that the allegations of the bill neither establish a contract, nor present for any genuine controversy or discussion the question whether there were a contract. No such question is in substantial verity presented by the bill.

If the question were, What is the correct addition of a thousand different sums, each represented by many figures? it would require time, and perhaps pains, and perhaps accountants, to reach the result. But such time and pains and expert aid would not raise the arithmetical process to the rank of real discussion or argument. Although it may here take a little time and attention to disentangle the relevant facts from the mass of irrelevant facts stated in the bill and to separate the question, or rather the *simulacrum* of a question, of law from many pages of legal discussion and quotations, nevertheless, when this troublesome and necessary work is done, it will be found that there remains no real, or really arguable, basis for the assertion of a contract right in the complainants to construct exclusively, or to construct at all, a railroad in streets of the City

of New York. The court below was, therefore, without jurisdiction.

Defiance Water Co. v. *Defiance, 191 U. S., 184:* The complainant sought the federal court on the ground that, by an ordinance of the defendant City, it was attempted to impair a contract right of the complainant. The Circuit Court retained jurisdiction, but dismissed the bill on its merits. This Court reversed the decree below at the appellant's cost and directed a dismissal for want of jurisdiction, saying, per FULLER, *C. J.* (p. 190):

> "We have repeatedly held that when a "suit does not really and substantially in- "volve a dispute or controversy as to the "effect or construction of the Constitution "or laws of the United States, upon the de- "termination of which the result depends, it "is not a suit arising under the Constitution "or laws. And it must appear on the record, "by a statement in legal and logical form, "such as is required in good pleading, that "the suit is one which does really and sub- "stantially involve a dispute or controversy "as to a right which depends on the construc- "tion of the Constitution or some law or "treaty of the United States, before juris- "diction can be maintained on this ground "(*Western Union Telegraph Co.* v. *Ann Ar- "bor Railroad Co., 178 U. S., 239; Gold "Washing & Water Co.* v. *Keyes, 96 U. S., "199; Blackburn* v. *Portland Gold Mining "Co., 175 U. S., 571; Shrevesport* v. *Cole, 129 "U. S., 36; New Orleans* v. *Benjamin, 153 U. "S., 411, 424).* * * *

(p. 194): "The fundamental question of "jurisdiction, first, of this Court, and then

" of the court from which the record comes,
" presents itself on every writ of error or ap-
" peal, and must be answered by the Court,
" whether propounded by counsel or not."

Shreveport v. *Cole, 129 U. S., 36 per* FULLER, *C. J.:*

" Unless this suit was one 'arising under the
" ' Constitution or laws of the United States'
" the Circuit Court had no jurisdiction; and
" if it did not really and substantially involve
" a dispute or controversy as to the effect or
" construction of the Constitution or some
" law upon the determination of which the
" recovery depended, then it was not a suit so
" arising."

St. Paul M. & M. R. Co. v. *St. Paul & N. P. R. Co., 68 Fed. Rep., 2, per* THAYER, *J., delivering the opinion of the Circuit Court of Appeals in the Eighth Circuit:*

" It does not follow, however, that the case
" at bar is one of federal cognizance, because
" it contains a reference to numerous acts of
" Congress and lengthy extracts therefrom.
" A case which, in fact, depends for its de-
" cision upon questions of local or general law
" cannot be brought within the jurisdiction
" of a federal tribunal as one arising under the
" Constitution and laws of the United States
" merely by reference in the complaint or dec-
" laration to some federal statute or statutes
" and by setting up a claim thereunder which
" is merely colorable and obviously without
" any reasonable foundation. If such a prac-
" tice was tolerated, the result would be that
" the jurisdiction of the federal courts would

" be unduly enlarged and made to comprehend
" a class of cases which were never intended
" to be tried therein."

McCain v. *Des Moines, 174 U. S., 168:* The corporate acts of the defendant City in levying certain taxes under an act of the legislature of Iowa passed in 1890, were attacked as unconstitutional, and the threatened proceedings to take the complainant's property was alleged to be contrary to the federal constitution. The bill was filed in the Circuit Court which sustained the defendant's demurrer for want of jurisdiction. This Court affirmed the decree saying, per PECKHAM, *J.*:

" It is therefore quite plain that the com-
" plainants base their case upon the allegation
" that their property is about to be taken from
" them by the city authorities without due
" process of law and in violation of the Con-
" stitution of the United States, because the
" act of 1890 violates the constitution of Iowa.
" That is a question of law, depending for its
" solution upon the law of Iowa, and as to
" what that law is the federal courts are
" bound in such a case as this by the decision
" of the state tribunal. There is no construc-
" tion of the Federal Constitution involved in
" that inquiry, nor any question as to its ef-
" fect upon the complainants' rights in this
" suit. The question whether their property is
" taken without due process of law must be de-
" cided with sole reference to the law of Iowa.
" How can it be said upon such facts that any
" question arises under the Constitution or
" laws of the United States? The claim of
" the complainants will not be defeated by one

" construction of that clause in the Constitu-
" tion or sanctioned by the other. *Starin* v.
" *New York*, 115 U. S., 248. There is no dis-
" pute about construction in any way what-
" ever; the only question is as to the validity
" of the city organization, which, as stated,
" is a matter of state law. * * *

" Such being the law of Iowa, we are of
" opinion that an allegation in the bill that
" this is a controversy and a suit of a civil
" nature arising under the constitution and
" laws of the United States, is not supported
" by the facts appearing in the bill. The
" facts alleged must show the nature of the
" suit, and it must plainly appear that it arises
" under the Constitution or laws of the United
" States; that is, there must be a real and sub-
" stantial dispute as to the effect or construc-
" tion of the Constitution or of some law of
" the United States upon the determination
" of which a recovery depends. (*Shreveport*
" v. *Cole, 129 U. S., 36; New Orleans* v. *Ben-*
" *jamin, 153 U. S., 411*)."

Western Union Co. v. *Ann Arbor Co., 178 U. S., 239, per* FULLER, *C. J., at p. 243:*

" When a suit does not really and substan-
" tially involve a dispute or controversy as to
" the effect or construction of the Constitution
" or laws of the United States, upon the de-
" termination of which the result depends, it
" is not a suit arising under the Constitution
" or laws. And it must appear on the record,
" by a statement in legal and logical form,
" such as is required in good pleading, that
" the suit is one which does really and sub-
" stantially involve a dispute or controversy

"as to a right which depends on the construc-
"tion of the Constitution or some law or treaty
"of the United States, before jurisdiction can
"be maintained on this ground. *Gold Wash-*
"*ing & Water Co.* v. *Keyes, 96 U. S., 199*;
"*Blackburn* v. *Portland Gold Mining Co., 175*
"*U. S. 571.*"

SECOND:—The court below had, therefore, if it were to retain jurisdiction, to find in the allegations of the bill a real and substantive federal question. Obviously there can be no real and substantive federal question unless the bill really and substantively present the question of a contract right held by the complainants against the State of New York. Assuming the truth of the allegations of fact, some contract, real or apparent, must be made out. Otherwise there is no jurisdiction.

New Orleans v. *New Orleans Water Co., 142 U. S., 79, 88:* This was error to the Supreme Court of Louisiana. The Court dismissed the writ saying, per Mr. Justice BROWN (pp. 87-88):

"While there is in the amended and supple-
"mental answer of the City a formal averment
"that the ordinance No. 909 impaired the ob-
"ligation of a contract arising out of the act
"of 1877, which entitled the city to a supply
"of water free of charge, the bare averment
"of a federal question is not in all cases suf-
"ficient. It must not be wholly without
"foundation. There must be at least color
"of ground for such averment, otherwise a
"federal question might be set up in almost
"any case and the jurisdiction of this court

" invoked simply for the purpose of delay. " Thus in *Millingar* v. *Hartupee, 6 Wall, 258,* " it was held that to bring a case within that " provision of the Judiciary Act which de- " clares that the final judgment of a state " court may be re-examined where is drawn " in question the validity of an authority exer- " cised under the United States, there must " be something more than a bare assertion of " the exercise of such authority. In deliver- " ing the opinion of the Court the Chief Jus- " tice observed: ' * * * In respect to the " ' question we are now considering, authority " ' stands upon the same footing with treaty " ' or statute. *If a right were claimed under* " ' *a treaty or statute and on looking into the* " ' *record it should appear that no such treaty* " ' *or statute existed or was in force,* it would " ' hardly be insisted that this court could re- " ' view the decision of a state court that the " ' right claimed did not exist.' This lan- " guage was used in connection with the first " clause of section 709 of the Revised Statutes " ' where is drawn in question the validity of " ' a treaty or statute of, or an authority ex- " ' ercised under, the United States, and the " ' decision is against their validity,' but it is " equally applicable to the next clause, which " covers the case under consideration, 'where " ' is drawn in question the validity of a statute " ' of, or an authority exercised under, any " ' State, on the ground of their being repug- " ' nant to the Constitution, treaties or laws " ' of the United States, and the decision is in " ' favor of their validity.'

"Applying the principle of this decision to " the present case, we think that before we " can be asked to determine whether a statute

" has impaired the obligation of a contract, *it*
" *should appear that there was a legal contract*
" *subject to impairment and some ground to*
" *believe that it has been impaired.*"

In cases of this character where this Court has held it sufficient for jurisdiction if the federal question were set up in good faith and were not wholly destitute of merit, at the least a contract has been established by sufficient allegations. Sufficient allegation of the existence of the contract is a *sine qua non* to the federal question here sought to be raised.

Illinois Central R. R. v. *Chicago, 176 U. S., 646:* Here the question was not over the existence of the contract alleged to be impaired, but whether the ordinance complained of impaired the contract. Mr. Justice BROWN speaking for the Court, said, referring to the latter question (p. 656), and again quoting from *Millingar* v. *Hartupee*:

"The claim is certainly not a frivolous one.
" In determining the existence of a federal
" question, it is only necessary to show
" that it is set up in good faith and
" is not wholly destitute of merit. Said Chief
" Justice CHASE in *Millingar* v. *Hartupee,*
" *6 Wall., 258, 261,* speaking of the valid-
" ity of an authority exercised under the
" United States: 'Something more than a
" 'bare assertion of such authority seems es-
" 'sential to the jurisdiction of this Court.
" 'The authority intended by the act is one
" 'having a real existence, derived from com-
" ' petent governmental power. If a differ-
" ' ent construction had been intended, Con-

> " ' gress would doubtless have used fitting
> " ' words. The act would have given jurisdic-
> " ' tion in cases of decisions against claims of
> " ' authority under the United States. * * *
> " ' If a right were claimed under a treaty or
> " ' statute, and, *on looking into the record, it*
> " ' *should appear that no such treaty or stat-*
> " ' *ute existed or was in force,* it would hardly
> " ' be insisted that this Court could review the
> " ' decision of a State Court that the right
> " ' claimed did not exist.' "

City Railway Co. v. *Citizens' Railroad Co., 166 U. S., 557:* Here again the fundamental contract was found to exist; and the language of the Court is to be read in the light of that finding. The only question was whether it had been impaired. Mr. Justice BROWN, speaking for the Court, said (p. 563):

> "All that is necessary to establish the jur-
> " isdiction of the Court is to show that the
> " complainant had, or claimed in good faith
> " to have, a contract with the City, which the
> " latter had attempted to impair. * * *
> " *That the complainant had a contract with*
> " *the City is entirely clear.* * * * (p. 564).
> " Whether the State had or had not impaired
> " the obligation of this contract was not a
> " question which could be properly passed
> " upon on a motion to dismiss so long as the
> " complainant claimed in its bill that it had
> " that effect and such claim was apparently
> " made in good faith, and was not a frivolous
> " one (*New Orleans* v. *New Orleans Water*
> " *Co., 142 U. S., 79, 88*)."

In no case has the force of the rule stated in the New Orleans case been impaired.

THIRD:—The appellants cite *Swafford* v. *Templeton, infra,* as holding a doctrine contrary to the rule of the New Orleans case (142 U. S., 79, *supra*). But they are in error. *Swafford* v. *Templeton* merely distinguished cases where the very subject-matter of the suit was federal—as plainly the subject-matter of this suit is not—from cases which were like this suit, where a federal question has been held to be presented in a controversy over subject-matter not federal. This is made clear by the report of the case.

Swafford v. *Templeton, 185 U. S., 487:* The plaintiff in error had sued in the Circuit Court of the United States to recover damages against the defendants for preventing his voting for a member of the National House of Representatives; and the suit was dismissed for want of jurisdiction. This Court reversed the judgment below, holding that there was jurisdiction, and saying, by Mr. Justice WHITE (p. 493):

> "The right which it was claimed had been
> " unlawfully invaded was one in the very na-
> " ture of things arising under the Constitu-
> " tion and laws of the United States, and that
> " this inhered in the very substance of the
> " claim. It is obvious, from an inspection of
> " the certificate, that the court, in dismissing
> " for want of jurisdiction, was controlled by
> " what it deemed to be the want of merit in
> " the averments which were made in the com-
> " plaint as to the violation of the federal
> " right. * * * True, it has been repeatedly
> " held that, on error from a state court to
> " this Court, where the federal question as-
> " serted to be contained in the record is man-

" ifestly lacking all color of merit, the writ " of error should be dismissed. *New Or-* " *leans Water Works Co.* v. *Louisiana, ante,* " *336 and authorities cited.* This doctrine, " however, relates to questions arising on " writs of error from State Courts where, " aside from the federal status of the parties " to the action or the inherent nature of the " federal right which is sought to be vindi- " cated, jurisdiction is to be determined by as- " certaining whether the record raises a *bona* " *fide* federal question. *In that class of cases* " *not only this Court may, but it is its duty,* " *to determine whether, in truth and in fact,* " *a real federal question arises on the record.* " And it is true, also, as observed in *New Or-* " *leans Water Works Co.* v. *Louisiana, supra,* " that a similar principle is applied in anal- " ogous cases originally brought in a Court " of the United States. *McCain* v. *Des* " *Moines, 174 U. S., 168; St. Joseph & Grand* " *Island Railroad* v. *Steele, 167 U. S., 659.* " But the doctrine referred to has no applica- " tion to a case brought in a federal court " where the very subject-matter of the con- " troversy is federal, however much wanting " in merit may be the averments which it is " claimed establish the violation of the fed- " eral right. The distinction between the " cases referred to and the one at bar is that " which must necessarily exist between con- " troversies concerning rights which are cre- " ated by the Constitution or laws of the " United States, * * * * * * the con- " tention respecting which may or may " not involve a federal question, depend- " ing upon what is the real issue to be " decided, or the substantiality of the aver- " ments as to the existence of the rights

"which it is claimed are federal in char-
"acter. The distinction finds apt illus-
"tration in the decisions of this Court hold-
"ing that suits brought by or against corpo-
"rations chartered by acts of Congress are
"cases *per se* of federal cognizance."

Wiley v. *Linkler, 179 U. S., 58:* This case also illustrates the distinction. It was here held that the federal court below had jurisdiction, this Court saying *per* Mr. Justice GRAY (p. 62):

"The right to vote for members of the Con-
"gress of the United States is not derived
"merely from the Constitution and laws of
"the State in which they are chosen, but has
"its foundation in the Constitution of the
"United States. * * * (p. 64.) This ac-
"tion is brought against election officers to
"recover damages for their rejection of the
"plaintiff's vote for a member of the House
"of Representatives of the United States.
"* * * (p. 65.) The Circuit Court, there-
"fore, clearly had jurisdiction of this ac-
"tion."

FOURTH:—It is obvious that the complainants' case falls within the second subdivision of the definition stated in *Swafford* v. *Templeton.* This is not a controversy concerning rights created by the Constitution or laws of the United States so that the controversy is in its essence federal. It is no more than a controversy "con-
"cerning rights not conferred by the Constitution
"or laws of the United States, the contention re-
"specting which may or may not involve a federal
"question, depending upon what is the real issue

" to be decided or the *substantiality of the aver-*
" *ments* as to the existence of the rights which it
" is claimed are federal in character."

II.

The allegations of the bill do not establish, or tend to establish, any contractual right of the Central Company to construct or operate a railroad in any street of New York. The allegations so clearly fail to establish any contract as to present no question for judicial consideration.

The bill alleges (p. 4) that the Central Company was organized in March, 1881, "under the so-
" called General Railroad and Tunnel Law of the
" State of New York, namely, chapter one hundred
" and forty of the laws of 1850, and the various acts
" amendatory of, and supplemental to, the same,
" and chapter five hundred and eighty-two of the
" laws of 1880." The Central Company derived its powers, therefore, from two sources:

First:—The general railroad law in force at the time of the incorporation (March, 1881); and

Secondly:—The tunnel law of 1880.

An examination of those statutes makes it plain that the Central Company did not have,—and, under them, could not have,—any contract right,

whether exclusive or not exclusive, to build or maintain a railroad in any street of the City of New York, or to prevent the State, or the defendants acting under the authority of the State, from building a rapid transit railroad for, and to be owned by, the City of New York.

III.

The Central Company acquired no contract right under the General Railroad Law.

Sect. 28 of the general railroad law in force when this company filed its articles, being chap. 140 of the laws of 1850, as amended by chap. 133 of the laws of 1880, provided that corporations formed under it should, in addition to the powers and privileges especially conferred thereby, possess "the powers conferred on corpora- " tions in the third title of the eighteenth chapter " of the first part of the Revised Statutes." The same provision is, in substance, found in sect. 1 of the general railroad law.

The provisions thus referred to in the Revised Statutes include (R. S. Pt. I. Ch. 18, T. 3, Sect. 1) the usual powers of all corporations and the special powers of stock corporations; but they do not include any power to construct railroads or any power to use the streets of a city. The right to con-

struct railroads must be found in the text of the general railroad law itself.

FIRST:—The general railroad law gave no right to build a railroad in any street of the City of New York without the consent of the City. Sect. 28 of that law prescribed the powers which every corporation formed under it should have in addition to the general powers already mentioned. Among the specific corporate powers and limitations relating to construction of railroads, was the following:

> "5. To construct their road across, along or "upon any * * * street, highway, * * * "which the route of its road shall inter- "sect or touch. * * * Nothing in this act "contained shall be construed * * * to "authorize the construction of any railroad "not already located in, upon or across any "streets in any city without the assent of the "corporation of such city."

The charter of the Central Company (pp. 36-37) set forth as the purpose of the incorporation "constructing, maintaining and operating a railroad in the City of New York and to run under certain streets specified in the charter."

Chap. 10 of the laws of 1860, which in effect amended the general railroad law provided that

> "It shall not be lawful hereafter to lay, con- "struct or operate any railroad in, upon or "along any or either of the streets or avenues "of the City of New York wherever such rail- "road may commence or end, except under the

" authority and subject to the regulations and
" restrictions which the legislature may *here-*
" *after* grant and provide."

The last mentioned statute was in effect when the Central Company took out its charter under the general railroad law. It was taken into the charter of the former City of New York as sect. 1943 of chap. 410 of the laws of 1882, and remained in force until the adoption of the charter of Greater New York, chap. 378 of the laws of 1897, by sects. 45, 72, 73 and 74, of which a scheme of local control of railroads in streets was established. Its plain effect has been stated by the Court of Appeals of the State.

Matter of Washington &c. Railroad Co., 115 N. Y., 442, per PECKHAM, *J.*, *at p. 445*:

" In regard to that city (New York) it is ad-
" mitted that the general railroad act has now
" no application, for, by chapter 10 of the Laws
" of 1860, it was made unlawful to thereafter
" lay, construct or operate a railroad in New
" York City except under the authority of the
" legislature to be thereafter granted. The
" remark of Judge Rapallo in the first cited
" case that, up to the time of the passage of
" the general surface street railroad act of
" 1884, there had been no law in force under
" which street railroads could be constructed
" except the rapid transit act, the general rail-
" road act of 1850, being inapplicable to street
" railways in cities, was not exactly accurate
" if applied to all the cities in the state, but was
" in entire accord with the truth in regard to
" the particular city (New York) which he
" was writing about and in which the corpora-

"tion existed whose rights were then under "review. * * * In the last case cited the "question was not in issue, and the remark "was a general one that the act of 1850, gives "no authority for the construction of street "railroads, and if it were limited to New "York City (by reason of the passage "of the act of 1860) it is certainly a correct "statement of the fact."

SECOND:—It is thus clear that under both the act of 1860, and subd. 5 of sect. 28 of the general railroad law of 1850, there could be no right to build a railroad without the consent of the corporation of the City; and no such consent is here alleged.

But beyond the statute was the constitution itself of the State requiring the consent of the local authorities and of a majority in value of abutting owners (or, in lieu of the latter, the substituted consent of the Supreme Court of the State). By the amendment adopted in 1874 (art. 3, sect. 18) there was adopted the following provision, which was continued in the new Constitution of 1894:

"No law shall authorize the construction or "operation of a street railroad except upon "the condition that the consent of the owners "of one-half in value of the property bound-"ed on and the consent also of the local au-"thorities having the control of that portion "of the street or highway upon which it is "proposed to construct or operate such rail-"road, be first obtained; or in case the "consent of such property owners cannot be "obtained, the General Term" (changed in 1894 to Appellate Division) "of the Supreme

" Court in the department in which it is pro-
" posed to be constructed may upon applica-
" tion appoint three commissioners, who shall
" determine, after a hearing of all parties in-
" terested, whether such railroad ought to be
" constructed or operated; and their deter-
" mination confirmed by the court may be
" taken in lieu of the consent of the property
" owners."

People v. *O'Brien*, 111 N. Y., 1, per RUGER, *C. J.*, at page 30:

" By such incorporation the company be-
" came an artificial being, endowed with ca-
" pacity to acquire and hold such rights and
" property, both real and personal, as were
" necessary to enable it to transact the busi-
" ness for which it was created, and allowed
" to mortgage its franchises as security for
" loans made to it, *but having no present au-*
" *thority to construct or operate a railroad up-*
" *on the streets of any municipality.* This
" right, under the Constitution, could be ac-
" quired only from the City authorities, and
" they could grant or refuse it at their pleas-
" ure. The Constitution not only made the con-
" sent of the municipal authorities indispensa-
" ble to the creation of such a right, but, by im-
" plication, conferred authority upon them
" to grant the consent, upon such terms and
" conditions as they chose to impose, and
" upon the corporation the right to acquire
" it by purchase. The framers of the Consti-
" tution, evidently treating the privilege as a
" valuable one, which should be disposed of
" for the benefit of the municipality, to those
" who would pay the highest price for it, gave
" the municipal authorities the exclusive

"right to grant the privilege, which had "theretofore been exercised by the legisla- "ture alone, and authorized its acquisition by "contract from such municipality."

Schaper v. Brooklyn, &c., Railway Co., 4 St. Rep., 860. The Supreme Court of the State here said, per BARTLETT, *J.*:

"Of itself the general railroad act con- "fers no authority upon any company "formed thereunder to build in a city street. "It expressly provides that nothing therein "contained shall be construed to authorize "the construction of any railroad not al- "ready located in, upon or across any streets "in any city without the assent of the corpo- "ration of such city. (Laws of 1850, chap. "140, §28, subd. 5, amended by laws 1880, "chap. 133, but unchanged in this respect "so far as the construction of its rail- "road in a city is concerned. Therefore "a corporation organized under this act ac- "quires only the privilege of applying to the "municipal corporation for permission to "build in or across particular streets. If "this permission is not granted by the City, "the road cannot be built there. *Under the "statute the municipal authorities become "the proximate source of power from which "the right to construct a railway in the street "must be obtained.*"

THIRD:—The constitutional provision strictly applied to a railroad under streets. Such a railroad is a "street railroad."

Matter of New York District Railway Company, 107 N. Y., 42: Referring to the tunnel stat-

ute, chap. 582 of the Laws of 1880, under which, as well as under the general railroad law, the complainants claim the right of the Central Company arose, the court said, per FINCH, *J.* (p. 50):

"We have reached the conclusion that the "act authorizes and regulates underground "street railways in a city or village and that "the appellants' road is such a rail-"way. * * * (p. 51.) The legislature "seems to have deemed it wise to make the "underground road a part of the streets and "its operation a street use, by direct enact-"ment. * * * (p. 52.) Not merely is the "easement of the public affected temporarily "by the process of construction, but perma-"nently by changing wholly the support of "that surface. We have often held that the "right of the public in the streets of a city "extends to and embraces, besides the sup-"port of the surface, the necessary sewerage "and room for water and gas pipes and the "like; and the right to lay and maintain these "is an important part of the public ease-"ment. * * * When the work is all "done the street will consist of two stories "or surfaces, one carrying the ordinary traf-"fic and movement lessened by so much as "is diverted to the swifter transit to the "other, and both together will do what one "alone did to the extent of its capacity.

"Such a road is to be deemed a street rail-"way, not only because it subserves street "purposes and reaps the benefit of street "easements, and occupies and modifies the "street surface, but also because it is fully "within the mischiefs which the constitu-"tional provision was designed to redress "and prevent. * * * (p. 52.) Where the

" railway runs under the streets, the adjoin-
" ing owners are as much and as dangerously
" affected as where it runs on their surface
" or above them. Whether the new surface
" is safe and sufficient, or weak and perilous,
" and invites or frightens away passage;
" whether the openings obstruct or hinder ac-
" cess to the abutter or pour out through the
" ventilators smoke and steam upon his
" premises; whether his vaults and founda-
" tions will remain safe and secure, or be
" undermined or weakened by vibration;
" whether his gas and water supply will con-
" tinue ample and convenient, and the new
" sewerage work him no injury; all these are
" to him questions of vital importance, affect-
" ing his comfort and convenience, the suc-
" cess of his business and the value of his
" property. The same reasons which dic-
" tated a constitutional protection against
" roads, on or above the surface of the
" streets, apply to those which are built be-
" neath in the manner here contemplated, and
" these should justly be deemed street rail-
" roads within the meaning of that phrase as
" used in the Constitution."

FOURTH:—The complainants argue in their bill and elaborately in their brief before this Court, that the filing by the Central Company on 28th March, 1882, of a map and profile of the route, duly signed and certified by its president and engineer and by a majority of its board of directors, gave the Central Company some contract right. Sect. 22 of the railroad law (p. 221 of the laws of 1850) provided for the filing of such map and profile; but the act did not contain, nor do the appellants

quote, any provision which grants to the company any right by reason of such filing. The filing was simply made a necessary condition under sect. 14 of the act to any condemnation of right of way. The general grant of power contained in sect. 28 included a right "to lay out its road not exceeding six rods in width" and the right already mentioned (subd. 5 of sect. 28) to construct the road along water courses and highways was subject to the prohibition of the construction of any railroad in, upon or across any streets of a city without the assent of the city corporation.

The courts of New York have, however, as between rival railroad corporations, adjudged that the company which has first filed its map and profile gets under the general law a prior right as against any corporation thereafter filing a map and profile. The appellants wrench some phrases in opinions from the facts of the cases; and they insist that the mere filing of a map and profile by a company incorporated under the general railroad law gave it an exclusive right not only as against other corporations, but as against the State to the occupation of the space included in such map and profile. Since the incorporation of a railroad company and the filing of its map and profile are proceedings absolutely within the control of private persons,—requiring the assent of no public officers (the function of the Secretary of State, register or clerk who receives the papers being merely ministerial) it would follow, if the appellants were right, that in this easy way, and practically without cost, any body of private citi-

zens numerous enough to constitute the incorporators and directors of a railroad company, might appropriate the most valuable streets of any city of the State. If the emphatic assertions of the complainants' bill could raise an apprehension that so intolerable a danger existed, it would be set at rest by examination of undoubted authorities.

The appellants' counsel cite *Rochester, &c.*, v. *N. Y., L. E. & Western R. R. Co., 44 Hun, 206*, where the General Term of the Supreme Court said that (p. 210).

> "Under the general railroad act, when a corporation has been organized in compliance with the conditions of the statute, and has made a map and profile of the route intended to be adopted by the Company duly certified and filed as required by the twenty-second section, it has acquired a vested and exclusive right to build, construct and operate a railroad on the line which it has adopted."

They cite what the Court of Appeals said in the same case (110 N. Y., 128), per GRAY, *J.* (p. 133), as follows:

> "Clearly there is involved in these provisions the intention of the legislature that, after the initial proceedings have been taken, which the statute points out as the first action of the new corporation, the lands over which the company's route is located shall be subjected to the right of the Company thereafter to construct thereon. * * *
> "When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of

> " its road, and has given the required notice
> " to all persons affected by such construction,
> " and no change of route is made, as the result
> " of any proceeding instituted by any land
> " owner or occupant in our judgment it has
> " acquired the right to construct and operate
> " a railroad upon such line; exclusive in that
> " respect as to all other railroad corporations
> " and free from the interference of any party.
> " By its proceeding it has impressed upon the
> " lands a lien in favor of its right to construct,
> " which ripens into title through purchase or
> " condemnation proceedings."

They also cite other cases (*pp.* 53-4 of their brief) showing that priority in filing a map gives priority in right. But the most casual inspection of these authorities shows that the doctrine held was that, as between the company which had first taken the proceedings and a company later taking like proceedings, priority of right belonged to priority of time. Nothing has been held adverse to the right of the State to use the routes for its own purposes or to authorize their use for another railroad; but that very right of the State has been held by the Court of Appeals.

People v. *Adirondack Co., 160 N. Y., 225, affirmed in this Court, 176 U. S., 335:* There a railroad corporation sought to extend its line of railroad by filing a map and profile of the extension and serving notice on the occupants of certain land included in the proposed extension which, before the Company had begun condemnation proceedings, was taken as part of the forest preserve of the State. The railway company claimed that, by fil-

ing its map and profile, it had acquired a lien upon the land which could not be affected by a subsequent proceeding by the Forestry Commission of the State to acquire the land. The corporation cited in behalf of its contention the same authorities upon which the appellants here rely. The Court of Appeals held, however, that no such lien was acquired against the State and that, assuming that anything of the character of a lien was acquired by filing the map and profile, it was created by statute and not by contract and that for any interference with it by the State there was no right to compensation unless some vested right had accrued under it. Referring to the claim that a right as against the State had been acquired by the simple filing of a map, the Court said (160 N. Y., pp. 245-247) per VANN, *J.*:

> "As there is no language expressly "giving it that effect in the nature of "things, the Legislature did not intend "to clothe a creature of the State with "the right to hold up the paramount "power, and compel it to pay money "for the bare filing of a map, which is not the "commencement of condemnation proceed-"ings, for it is filed under the Railroad Law, "while condemnation is had under the Code "of Civil Procedure. * * * The effect of "the map when filed was to give warning to "other railroads that a certain route had been "pre-empted by the defendant. It established "no right against the owner, because the Con-"stitution forbids it; it established none "against the State, because its power is para-"mount, but as against all other railroad com-

" panies, and as against all other creatures
" of the State empowered to use the right of
" eminent domain, it gave the exclusive right
" to occupy the particular strip of land for
" railroad purposes *until the Legislature au-*
" *thorized it to be devoted to some other pub-*
" *lic use.*"

" The general language used in certain cases
" relied upon by the defendant should be read
" in the light of the facts then before the Court
" (*Rochester H. & L. R. R. Co.* v. *N. Y., L. E.*
" *& W. R. R. Co., 110 N. Y., 128; Suburban*
" *Rapid Transit Co.* v. *Mayor, &c., 128 N. Y.,*
" *510*). These cases simply involve controver-
" sies between corporations created by the
" State as to a located line, the legislation nec-
" essary to enable one corporation to condemn
" land previously condemned by another and
" the like. The State was not a party to any of
" them and the only question involved was as
" to which corporation was ahead. The so-
" called lien was simply an exclusive right of
" one of two contending railroad corporations,
" as against the other, to build a road on a
" certain piece of land, or of a railroad corpo-
" ration to hold land already condemned for a
" public use, as against a city seeking to con-
" demn it for another public use, without spe-
" cial authority from the Legislature. * * *
" Here the question arises between the State
" and one of its creatures, and the claim that
" a lien good as against the creator of the cor-
" poration, was placed upon the land simply
" by the grant of a franchise to exist as the cor-
" poration in order to build the road, followed
" by the filing of a map of the proposed route
" and notice thereof to the occupants, but by
" nothing else, cannot be sustained. There is
" no property in a naked railroad route, exist-

" ing on paper only, that the State is obliged
" to pay for when it needs the land covered by
" that route for a great public use, and its
" officers are authorized to act by appropri-
" ate legislation."

Upon the affirmance of the case here, the Court said, per FULLER, *C. J.*, (176 U. S., 345, 346, 350):

" But the capacity to acquire land by con-
" demnation for the construction of a rail-
" road attends the franchise to be a railroad
" corporation, and when unexecuted cannot
" be held to be in itself a vested right sur-
" viving the existence of the franchise or an
" authorized circumscription of its scope.
" * * *

" In arriving at these conclusions the Court
" of Appeals was construing and applying
" the laws of the State of New York, and we
" perceive no adequate ground for declining
" to accept its views in accordance with the
" general rule on that subject. * * *

" We agree with the Court of Appeals, as
" has already been indicated, that the rail-
" road company occupies no position entitling
" it to raise the question. The steps it had
" taken had not culminated in the acquisition
" of any property or vested right."

Suburban Rapid Transit Co. v. *Mayor, 128 N. Y., 510:* This case is also cited for the appellants, but quite without justification. It was considered by the Court of Appeals in the *Adirondack* case just quoted, and in no way conflicts with the latter. Instead of supporting appellants' proposition, it illustrates the reverse of that proposition.

Under the former rapid transit act of New York (chap. 606 of the laws of 1875) the former rapid transit board had determined upon certain routes. After its determination was complete, the necessary consents of the local authorities and of abutting owners were obtained; and subsequently, by condemnation proceedings under the statute, the company duly acquired the right to a strip through private lands over which one of the routes had been located (128 N. Y., *p.* 514). After the right of the company has been thus created and established, the City of New York sought, for a park, to take from the company the particular piece of land which it had acquired by condemnation. The Court of Appeals held that, when the route or routes had been located with the consent of the municipal authorities and of the property owners and in the manner prescribed by the rapid transit act which authorize the construction of railroads in, under or over the streets, the company acquired an (p. 520)

> " absolute and exclusive franchise to build
> " upon the route located for it and to the
> " use of which the lands were devoted
> " through the exercise of the paramount
> " right of sovereign power, which fran-
> " chise was unimpaired with respect to the
> " right to take and use the land in question
> " by the fact that the work of actual construc-
> " tion had not reached it at the time the legis-
> " lature passed the act for the new parks."

If there were any inconsistency between this case and the Adirondack case, the latter case as the later expressions of the court must pre-

vail. But there was no inconsistency. The proposition which the earlier case affirms was that the claim of the City to subject to another public use for the City lands already and completely dedicated to a public use, was not authorized by legislation of that explicit character necessary to sustain a condemnation of property already dedicated to a public purpose. The court merely applied the rule stated by the same court in *Re New York, L. & W. R. Co., 99 N. Y., 12, at p. 23* per FINCH, *J.*:

> "It could not be intended that the State, " having authorized one taking whereby the " land became impressed under authority of " the sovereign with the public use, meant to " nullify its own grant by authority to an- " other corporation to take them again for " another public use unless it so specifically " decreed, it has been ruled that lands so held " and impressed with a public trust were not " embraced in words of general authority."
>
> Matter of City of Buffalo, 68 N. Y., 167.
> Matter of Boston, &c., Railway Co., 79 N. Y., 669.

The court in the Suburban Rapid Transit Company case pointed out the inchoate character of the right acquired under the general railroad law and distinguished it from the right acquired under the rapid transit act by the assent of the local authorities and abutting owners, saying per GRAY, *J.*, (128 N. Y., p. 518):

> " With the ordinary railroad company " formed under the general railroad act, the " enterprise as to the construction and oper-

" ation is inchoate after it is erected into a " corporation whereas the corporation which " is erected under the rapid transit act com- " mences its existence and operations with " everything planned and, except in details, " perfected. Its line of road is located and " the streets, places or lands over which it is " defined by the commissioners are im- " pressed with a public use and are dedicated " to the purposes and uses of the corporation " to be organized. * * * (p. 519.) The " right which the plaintiff acquired to con- " struct and operate the railroad upon the " route described in its articles of associa- " tion lacked nothing for its efficacy or com- " pleteness. It had become an obligation and " was one of the unalterable conditions and " a fixed public feature of the corporate ex- " istence. *When to it were subsequently* " *added the consents of municipal authorities* " *and of property owners, was any feature* " *wanting to the fullest franchise in such re-* " *spects?*"

Even in that case the New York court refused to hold that the company acquired any *contract* right as against the State, for it said, per GRAY, *J.*, at p. 521:

" The articles of association under which " this corporation was formed, were its char- " ter with the State, and though a deprива- " tion of the franchises granted may be with- " in the power of the legislature to authorize " if some public necessity should demand it, " we should not deem that power exerted, in " the absence of some unequivocal expression " of the legislative intent."

FIFTH:—If the Central Company acquired by incorporation under the general railroad law any actual right to construct a railroad, the right had terminated long before the filing of the bill. The bill affirmatively showed that, when it was filed on 9th July, 1901, the Central Company and its successors in interest had neither finished its road nor begun its construction for more than eighteen years after its articles of association were filed and recorded (pp. 4, 8). Sect. 47 of the general railroad law provided that

> "If any corporation formed under this act "shall not, within five years after its articles "of association are filed and recorded in the "office of the Secretary of State, begin the "construction of its road and expend thereon "ten per cent. of the amount of its capital or "shall not finish its road or put it in opera- "tion within seven years from the time of "filing its articles of association as afore- "said, *its corporate existence and powers shall* "*cease.*"

Inasmuch as, under this law, a railroad corporation, filing its map and profile, obtained a prior right against any other later competitor terminable only by express legislation,—it was obviously necessary that the law should enforce diligence upon the company first acquiring priority that it should not play the dog in the manger. Therefore the statute prescribed time limits. For the same reason it was necessary that the corporate powers should end without intervention by the attorney-general or other suit by the State. So

far as the mere acts of incorporation and of filing a map should give priority,—other and more diligent competitors, if the privileges were not availed of, should not be delayed for longer periods than the five and seven years. Therefore it is that the court of last resort of the State has held this act to be self executory. It needs no action or judicial proceeding to declare and complete a forfeiture of a corporate existence and powers where the corporation has failed to act for the very ample periods provided by the statute. There is no question of forfeiture, but of a limit of time on a corporate right.

Re Brooklyn, Winfield & Newtown R. R. Co., 72 N. Y., 245.

Re Brooklyn, &c., R. R. Co., 75 N. Y., 335.

Brooklyn Steam Transit Co. v. *Brooklyn, 78 N. Y., 524.*

In the first two of these cases the Court of Appeals dealt with the very provision of the general railroad law here under consideration. There was no dissent in either case. In the first the Court said, per ALLEN, *J.* (72 N. Y., p. 249):

> "The legal existence of a corporation authorized to construct a railroad is at the foundation of the right to take property for its use. * * * It needed no action or judicial procedure to declare or complete a forfeiture of the charter and loss of corporate powers. The statute executed itself, and the non-existence of the corporation could be alleged in opposition to this application."

In the second case, the Court, referring to the first case, said, per ANDREWS, *J.* (75 N. Y., 357):

> "This Court * * * recognized the "general principle that a corporation by "omitting to perform a duty imposed by its "charter, or to comply with its provisions, "does not *ipso facto* lose its corporate char- "acter, or cease to be a corporation, but "simply exposes itself to the hazard of being "deprived of its corporate character and "franchises by the judgment of the Court in "an action instituted for that purpose by the "Attorney-General in behalf of the people. "But while affirming this general proposi- "tion the Court held that by force of Sect. "47 of the general railroad act * * * "the corporate existence of the petitioner ab- "solutely terminated."

This interpretation of the general railroad law by the highest judicial authority of the State was made in 1878, years before the Central Company was incorporated.

The Appellants cite cases in other jurisdictions or cases in New York where the provision is expressly for forfeiture. But nothing has impaired or raised a doubt as to the good sense, necessity and existence of the rule for New York, as the Court of Appeals established it. Even in much later cases where other statutory language has been held to have other meaning, the binding force of the decisions has been recognized.

Matter of Brooklyn El. R. R. Co., 125 N. Y., 434, at p. 441.
Matter of New York & Long Island Bridge Co., 148 N. Y., 540, at p. 547.

In the first of these cases, the Court, referring to the cases, decided in 1891, above cited from *72 N. Y.*, and *78 N. Y.*, said, per EARL, *J.*, (125 N. Y., 441):

> " We held that this clear and emphatic lan-
> " guage indicated a legislative intent that the
> " corporate life should, for the defaults men-
> " tioned, come to an end, and not merely be
> " exposed to forfeiture by proceedings on be-
> " half of the State. These decisions, we
> " think, stand well upon reason."

Such construction of the general railroad law of New York having been made by its court of last resort before any right accrued to the Central Company, it will be followed by this Court.

> *Adams Express Co.* v. *Ohio, 165 U. S., 194, per* FULLER, *C. J., at p. 219.*
> *Vide* numerous other authorities cited in Foster's Federal Practice, 3rd ed., sect. 375, at pp. 881, 882.

The Central Company, claiming under the general railroad act of 1850, could not get more than that law gave it. And the right or, rather, the priority, which that law gave to a railroad company, was limited to certain periods unless within those periods the railroad should be begun and constructed and completed. If the law made a contract, the limitations prescribed by the law were a part of the contract.

IV.

Neither the municipal authorities nor the abutting property owners (nor in lieu of such property owners, the Supreme Court of the State) have consented to the construction of the proposed railroad of the Central Company.

The Appellant's bill itself recognized the necessity to a valid franchise in the Central Company that there should be these constitutional and statutory consents; and the Appellants argue that the consent given by such authorities to the *municipal* rapid transit railroad now under construction by the defendants and the construction of which is in this very suit sought to be enjoined, inures to the benefit of the railroad of the Central Company. The claim hardly seems serious; and we find difficulty in treating it with respect.

The allegations of the bill at p. 28 are that

> " the plans and specifications thus adopted
> " by said Board (the Rapid Transit Board, for
> " purposes of municipal construction) * * *
> " were *substantially the same* plans and spec-
> " ifications for an underground railway upon
> " said route that had previously been adopted
> " and projected for the construction of the
> " railroad and tunnel of the Central Tunnel
> " Railway Company and of your orators.
> " The Common Council, the Mayor and the
> " local authorities of the City of New York,

" in accordance with the provisions of the con-
" stitution of the State of New York
" and in accordance with the provisions
" of said rapid transit act, have duly
" given their consent to the construction of *an*
" underground railroad and tunnel upon the
" route specified in the articles of association
" and said maps of the said Central Tunnel
" Railway Company and of your orators.
" The Appellate Division of the Supreme
" Court for the First Department has, upon
" the application of said Rapid Transit Board,
" made in accordance with and under color
" of said rapid transit act, appointed three
" commissioners to determine after a hearing
" of all parties interested whether *an* under-
" ground railroad and tunnel ought to be con-
" structed and operated upon the route spec-
" ified in the articles of association and said
" maps of the said Central Tunnel Railway
" Company and of your orators. Said Commis-
" sioners after duly hearing all parties inter-
" ested in accordance with the said constitution
" and the said rapid transit act, have duly de-
" termined that *such* a railroad and tunnel
" should be constructed and operated upon
" said route. Their determination, in accord-
" ance with said constitution *and the said rap-*
" *id transit act* has been duly approved by the
" said court and has been taken in lieu of the
" consent of the property owners of property
" bounding upon said route. The date of the
" approval of said court was on or about April
" 6, 1898."

The complainants,—having thus alleged the proceedings of the defendant Rapid Transit Board and of the local authorities for a construction of the mu-

nicipal railroad of the City under the rapid transit act, and having failed (for notorious truth would not permit them) to assert that the constitutional consents had been given *to the Central Company or to any of the rights claimed for it*,—they nevertheless saw fit in their bill, referring to the order procured by the defendant Rapid Transit Board, to add the following (p. 28):

> "Thereupon by the entry of such order said "Appellate Division perfected and confirmed, "as your orators are informed and believe, "the right *of your orators* and the exclusive "franchise of your orators to construct a "street railroad and tunnel upon said route."

It is impossible to argue upon this seriously. We can only ask the Court to look at the record, bearing in mind the old and familiar rule that doubts arising on the face of a pleading are to be resolved against the pleader (*Phelps* v. *McDonald*, 99 U. S., 298, per SWAYNE, *J.*, at p. 305). The bill itself set out the scheme of municipal construction. It set out the provisions for a rapid transit board (p. 15), for the submission to the electors of the City of the question whether there should be municipal construction of railroads (p. 15), for the power of that board, in case the majority vote favored municipal construction, to grant (subject to the constitutional consents) the right to maintain and operate the municipal railroad for not less than thirty-five years nor more than fifty years (p. 15), for the advance by the City of the funds to construct the railroad, for the borrowing of money and issuing of bonds to provide the

moneys (p. 15), for the laying out of the routes and the adoption of the plan of construction by the Rapid Transit Board, for the requisite consent of the local authorities consisting of the Mayor and Common Council, and of a majority in value of the abutting owners (or in lieu thereof of the Supreme Court of the State), for the various steps of procedure after the popular vote in favor of municipal construction (pp. 15-16), and for details of the contract for the construction and operation of the municipal road (pp. 17-18).

Rapid Transit Act, chap. 4 of the laws of 1891, as amended and especially as amended by chap. 752 of the laws of 1894,—the latter amendment providing for the municipal construction.

The Appellants' bill presented portions of the proceedings of the defendant Rapid Transit Board taken to carry out the statutory popular mandate for municipal construction. The bill cited the opinions of the judges of the Appellate Division of the Supreme Court upon the application of the Board (pp. 21-25).

Re Rapid Transit Railroad Commissioners, 5 App. Div., 290.
Second application of same Board, 23 App. Div., 472.

The court below and this Court, having been thus introduced by the bill to the procedure of the defendants, the bill specifically alleged (p. 28) that, "under color of said rapid transit act the

"said Board" had "determined upon the con-
"struction of an underground railroad in the
"City of New York upon the routes specified in
"the articles of association and said maps of the
"said Central Tunnel Railway Company;" that
the local authorities "in accordance with the pro-
"visions of said rapid transit act" had "duly
"given their consent to the construction of **an**
"underground railroad and tunnel;" and that the
"Appellate Division of the Supreme Court for
"the First Department" had, "upon the applica-
"tion of said Rapid Transit Board, made, in ac-
"cordance with and under color of said rapid
"transit act, appointed three commissioners to
"determine * * * whether **an** underground
"railroad and tunnel ought to be constructed and
"operated;" that "said commissioners" had
"duly determined that **such a** railroad and tun-
"nel should be constructed and operated;" and
"that their determination in accordance with such
"constitution and the said rapid transit act" had
"been duly approved by the said Court and" had
"been taken in lieu of the consent of the property
"owners."

It is thus plain upon the face of the bill, and beyond any possible discussion, that the only consent given by the municipal authorities, or by the Supreme Court in lieu of the property owners, has been given to the municipal construction here sought to be enjoined. The assertions of the bill that the determination and consents in favor of the municipal construction authorized the railroad of the Central Company, because that rail-

road occupied the same route, or a part of it, and was "an" underground railroad is, we submit, little less than audacious trifling. The fact remains upon the face of the bill that the consent absolutely necessary to the validity of the railroad of the Central Company has *not* been given by either the local authorities or by the property owners, or by the Supreme Court of the State acting in lieu of the property owners.

V.

The Central Company acquired no right under the tunnel law, chapter 582 of the Laws of 1880.

The portion of the bill which deals with the claim under this act is little less than amazing.

The Central Company is alleged to have been incorporated under the tunnel law as well as under the general railroad law (p. 4). Sect. 1 of the tunnel law is alleged (p. 5) to have provided that

> "whenever, according to the route and
> " plans adopted by any railroad company
> " * * * under chapter one hundred and
> " forty of the laws of eighteen hundred and
> " fifty" (the general railroad law), "it shall
> " be necessary or proper to build said road or
> " any part of the same underground * * *
> " it shall be lawful for said company to enter
> " upon and acquire title to and use such lands

> " * * * as shall be necessary for purposes
> " herein mentioned, and they shall have the
> " power to construct, erect and secure the
> " necessary foundations and other struc-
> " tures."

The same section provided, as set out in the bill (p. 5), that the consent of abutting owners and municipal authorities should be had or, if they could not be had, then that application might be made to the General Term of the Supreme Court for the appointment of commissioners who should determine whether the railroad ought to be built and that

> "the determination by said commissioners
> " confirmed by the court may be taken in lieu
> " of said authorities and property owners."

Such is the statute set forth in the bill. Such allegations, one might suppose, would be introductory to an allegation that the consents *had* been obtained, or, if not, that the substituted consent of the Supreme Court *had* been accorded. But instead, *the bill sets forth that none of these consents had been obtained.* The complainants gravely alleged that "on account of the prejudice then " existing among the inhabitants and property " owners of the City of New York" (p. 6) the Central Company was unable to obtain the statutory consents of the municipal authorities and abutting owners, and thereupon applied to the supreme court for the appointment of commissioners; that that court appointed commissioners, one of whom declined to serve; that application

was then made by the Central Company to the court for appointment of another commissioner to fill the vacancy; that the court thereupon appointed another commissioner; that he declined to serve; that the Central Company thereupon applied to the court for the appointment of a third commissioner (p. 7); that "said application was "duly granted by said court;" but that the court failed to make an order appointing the new commissioner. The bill then alleged (p. 8) that

> "In consequence of said inaction of the said "General Term and of its said successor" (meaning the Appellate Division of the Supreme Court constituted by the Constitution of 1894) "proceedings before said com- "missioners have been necessarily suspend- "ed; and the said Central Tunnel Railway "Company has not and its successor, your "orator, the Underground Railroad of the "City of New York, has not been able to con- "tinue the proceedings before said commis- "sioners; and neither of said corporations "has been able to commence the construction "of its line of railroad."

The bill charged inaction and even laches (pp. 7-8) upon the Supreme Court. For, having thus alleged the failure of the Central Company to obtain the consents prescribed by the Tunnel statute, the bill proceeded to allege (p. 8) "that by "the aforesaid proceedings,"—that is to say, by an application to the Supreme Court which failed,

> "the said Central Railway Company has "acquired a vested and exclusive right and "an exclusive franchise and an exclusive ease-

" ment for the construction of a tunnel and an
" underground railroad over the route spec-
" ified."

We venture to deem it unnecessary to submit any argument upon this portion of the Appellant's claim. The statement is sufficient. It may, however, be added that the obvious reason why the Supreme Court of the State refused to permit the proceeding under the statute to go on, was that the Tunnel law was found to be unconstitutional. The very same General Term to which the Central Company made its application so adjudged it in October, 1886.

Matter of New York District R. R. Co.,
42 Hun, 621.

The ground of the unconstitutionality was that, —while the constitution absolutely required the consent of the municipal authorities, and did not provide any substituted consent of the Supreme Court therefor as it did in the case of non-assenting abutting property owners,—the statute, in defiance of the constitution, undertook to provide for such substituted consent in the case of refusal by the municipal authorities. The decision of the General Term was affirmed in the Court of Appeals in the report next cited.

Matter of New York District R. R. Co., 107 N. Y., 42, cited supra: The petitioner corporation, claiming under the Tunnel law being unable to obtain the consent of abutting owners, applied to the Supreme Court for the appointment of commission-

ers under the tunnel act. The Supreme Court denied the application on the ground that the act was unconstitutional, the court saying per FINCH, *J.* (p. 50):

> "The company's counsel argue that it gets "its authority for the construction and operation of its underground road not from the "Act of 1880, but from the General Act of "1850, under which it was organized. But that "act, as we have held, has no application to "street railroads (N. Y. Cable Co. *v.* Mayor, &c., "104 N. Y., 1), and if it had, the Act of 1860, "Chapter 10, takes away the authority so conferred, for it provides that 'it shall not be "'lawful hereafter to lay, construct or operate "'any railroad in, upon or along any or either "'of the streets or avenues of the City of "'New York, wherever such railroad shall "'commence or end, except under the authority and subject to the regulations and restrictions which the Legislature may hereafter grant and provide.' Having held "that appellant's road is a street railway, and "shown that it is planned to be built in and "along the city streets, it follows that it has "and can have no authority to construct its "proposed road under the Act of 1850; and if "it does not get it under the Act of 1880, it has "no authority at all and no standing before the "Court. I think that the truth may be that the "appellant derived its corporate existence "from the Act of 1850, but certainly not its "right to construct its contemplated road; and "that such right could only come from the rapid transit act, or the act of 1880, and that the "latter is an act which authorizes the construction and operation of a street railway, and "so is within the constitutional provision."

It was further argued that only so much of the tunnel act was invalid as made the order of the Supreme Court stand for the consent of the municipal authorities and that the portion of the act providing for an order in lieu of the consent of the property owners alone was valid. The Court of Appeals rejected the contention, further saying per FINCH, *J.* (p. 54):

> " The order when made is a single thing
> " which must have the statute effect or none.
> " * * * The Legislature has declared that
> " when made it shall stand for two things.
> " We are asked to say that it shall not, but
> " only for one. If we do that we invade the
> " domain of the Legislature; we change its
> " mandate as to the effect of the order; it
> " ceases to be the order authorized and be-
> " comes another and different one. * * *
> " Very possibly, the act may stand as an au-
> " thority for the construction of an under-
> " ground street railway upon the condition of
> " the assent of the city authorities and the half
> " of abutting values, and rejecting all the pro-
> " visions for the appointment of commission-
> " ers, whose order shall be a substitute. Fur-
> " ther than that we do not deem it our duty
> " to go."

VI.

Apart from the claim derived by the complainants through the Central Company and already dealt with in this brief, the bill below alleged no right in either appellant to construct or maintain a railroad under the streets of New York.

THE UNDERGROUND COMPANY:— This company was formed by the consolidation of the Central Company with two other companies, in behalf of neither of which any claim is made. The consolidation is alleged to have taken place under the Railroad Law of New York (which succeeded and substantially included the general railroad act of 1850, discussed above), being chap. 39 of the General Laws of the State, or chap. 676 of the laws of 1892. Sect. 16 of that statute (laws of 1892, p. 1388) provided that

> "When, according to the route and plan "for the building of its road adopted by any "railroad corporation hereafter incorpor- "ated, it shall be necessary or proper to "build it or any part of it underground * * * "such road or any part of it may be built "within the limits of any city * * * "and may run by means of a tunnel under- "neath any of the streets, roads or public "places thereof," and further that "such "corporation shall, before constructing the "same underneath any such street, road or

"public place, have obtained the consent of
"the owners of one-half in value of the prop-
"erty bounded on the line of such street,
"road or public place and the consent * * *
"of the proper authorities of the City having
"control of such streets, roads or public
"places. If the consent of such property
"owners cannot be obtained, the General
"Term of the Supreme Court * * *
"may upon application appoint three com-
"missioners who shall determine * * *
"whether such railroad ought to be built un-
"derneath such streets * * * and the de-
"termination of the commissioners confirmed
"by the Court may be taken in lieu of the con-
"sent of the property owners."

There is no allegation that the Underground Road obtained the consent either of the "proper "authorities of the City" or of the property owners or of the General Term of the Supreme Court. The claim,—coming measurably near to frivolity,—that the consents given to the municipal rapid transit railroad could be availed of by appellants has been sufficiently discussed (*supra*, pp. 41-46).

The only rights claimed to belong to the Underground Company in addition to those derived from the Central Company are stated in the bill at pp. 10-12 as consisting of:

(*a*) A right arising through the payment by that Company of a tax of one-eighth of one per cent. of its capital stock on or about 21st August, 1896, at the time its articles of consolidation and incorporation were filed; and

(*b*) A right created or arising through the filing of a map or profile on or about 10th June, 1897.

(*a*) The Underground Company paid its incorporation or organizing tax under the Tax Law of the State, sect. 180 of chap. 908 of the laws of 1896, referred to in the bill of complaint, which provided that

> "Every stock corporation incorporated "under any law of this State shall pay to the "state treasurer a tax of one-eighth of one "per centum upon the amount of capital stock "which the corporation is authorized to have "and a like tax upon any subsequent in- "crease. Such tax shall be due and payable "upon the incorporation of such corporation "or upon the increase of its capital stock. "* * * In case of the consolidation of ex- "isting corporations into a corporation, "such new corporation shall be required to "pay the tax hereinbefore provided for only "upon the amount of its capital stock "in excess of the aggregate amount of capital "stock of said corporations."

It is not open to any argument that the payment of such tax for the mere privilege of being a corporation did not give, or begin to give, any right to the Underground Company to occupy with its proposed railroad any street of the City of New York. The Tax Law contained not a word justifying such a pretence.

(*b*) We have already sufficiently discussed the

character of the right or claim created by the filing of the map and profile.

It is proper to add that the Underground Company was, according to the bill, incorporated in August, 1896, more than two years after the amendment of 1894 to the rapid transit act; and that it is under such amendment of 1894 that the defendants are constructing the municipal rapid transit railroad of the City here sought to be enjoined.

THE COMPLAINANT RAPID TRANSIT COMPANY.— What has been said with respect to the Central and Underground Companies applies also to this company. And we may add that, as in the case of the Underground Company, its incorporation in April, 1897, was strictly subject to the rapid transit law of the State. It was strictly subject to the railroad law (chap. 39 of the general laws) under which it was incorporated and under which it could get no right to construct a railroad under the street, except by obtaining the consent of the municipal authorities and the abutting property owners or, in lieu of the latter consent, the substituted consent of the Supreme Court.

The bill alleges that the payment of $125, the incorporation tax of ⅛ of 1 per cent. upon the capital stock made by this Company on 10th April, 1897, was accepted by the Treasurer of the State (p. 13)

> " as full payment of the tax and considera-
> " tion for the privilege of the organization

"of your said orator and for the construc-
"tion and operation of a railroad upon the
"routes specified in its said certificate of in-
"corporation and for the privilege of exercis-
"ing all its franchises in pursuance of chap-
"ter 908 of the laws of the State of New York
"approved in the year 1896 and the other laws
"of the State of New York *and thereby and*
"*thereupon the State of New York entered in-*
"*to a contract with your orator whereby the*
"*said State granted to your said orator the*
"*exclusive right and franchise to construct*
"*and operate a railroad upon the said route.*"

The Appellees find themselves quite unable to submit any further argument upon this matter than to point out that there is not one word in chap. 908 of the laws of 1896 (the tax law of the State) granting any right to construct or operate a railroad or making the incorporation tax a consideration for any such right. The incorporation tax is levied solely under sect. 180 of that act.

VII.

Nor are there merits in the other contentions of the appellants.

1. They argue that, because, upon the preliminary application made by the Central Company to the General Term of the State Supreme Court for the appointment of commissioners to determine whether its railroad ought to be allowed to be built, the court made an order (*Exhibit B*) for the

appointment of commissioners and in it recited that the Central Company was a "railroad com- " pany formed under chap. 140 of the Laws of " 1850 known as the general railroad act * * * " and that, according to the routes and plans " adopted by the petitioner, it" was "necessary " to build said railroad underground and in a " tunnel; and that it" was "the intention of the " petitioner so to build such railroad under the " provisions of chap. 582 of the Laws of 1880," therefore the court adjudged as against the whole world the validity of the company's incorporation and franchise.

Upon this also, serious argument seems to be impossible. The order was *ex parte* (pp. 39-40). The only requirement of notice to the parties interested was of a notice to be given by the commissioners, after their appointment of a meeting on 10th February, 1883, at 1 P. M.; but no such meeting appears to have been held and no such notice appears to have been given. On the contrary, it appears that, after the vacancy made by the refusal of one commissioner to serve, the court declined to make any further appointment, and that the commission never acted. The order has not a single element of an adjudication of the incorporation of the Central Company; and much less of any recognition by the court or any other authority of a right on the part of the company to build a railroad. That right indeed, was the very thing to be later determined in the proceeding initiated by the order. The Appellant's counsel choose to say (their brief, p. 67) that this order was "a decision

"*in rem* which binds all the world." And for support of that proposition they refer to *Matter of Union Elevated R. R. Co., 112 N. Y., 61:* That case is as far from the case presented by Appellants as can well be imagined. The court, there upon an application to condemn private property, dealt with a completed railroad franchise. Such franchise had been initiated under the former rapid transit act, chap. 606 of the laws of 1875; the mayor of the City had, under that act, appointed commissioners, who, pursuant to its terms, had laid out the routes and adopted the plan of construction of the railroad; the petitioning company had then, pursuant to the act, been publicly incorporated under the auspices of such commissioners; the local authorities had thereupon given their consent; and thereupon,—the abutting owners not consenting,—the General Term of the Supreme Court, pursuant to the Constitution of the State, had appointed commissioners who, upon public notice to all interested, had reported in favor of the construction; and their determination had been confirmed by the General Term. The franchise was thus completed according to the constitution and the rapid transit act with the assent of the municipal authorities and of the General Term of the Supreme Court. The proceedings consummated by the decision of the General Term were held to be proceedings *in rem* binding all the world. The case obviously brings no authority to the support of the Appellants' proposition, destitute, as they are, of any of the title thus set forth.

2. We do not deem it necessary to argue the Appellant's proposition (*their brief, pp. 67, 85*) that the imposition of taxes upon their companies estopped "the City of New York, the officers and " citizens of that City, and all persons subse- " quently contracting with that City" to build a rapid transit railroad.

It is, perhaps, proper, however, that we should refer to the statement of the learned counsel at *p.* 85 of their brief as follows:

> "The receipt of the taxes *upon the fran-* " *chises* estops the City from disputing their " existence."

There is nothing in the bill which shows that any tax was ever levied upon any franchise to build a road claimed by the bill. The references of the bill to the payment of taxes are: *First,* at *p. 11,* where it is said that, upon the incorporation of the Underground Company and the consolidation into it of the Central Company in 1896, the Underground Company paid the incorporation tax of ⅛ of 1 per cent. upon its capital stock; and, *Secondly,* at *p. 13,* where the Complainant Rapid Transit Company, upon its incorporation, on 10th April, 1897, paid a tax of $125, or ⅛ of 1 per cent. upon its capital stock; and, *Thirdly,* at *p. 14,* where the Complainant Rapid Transit Company is alleged to have "paid taxes duly assessed " against it by the City, County and State of New York." There is nothing in the bill showing or tending to show the payment of any tax upon any right, real or pretended, to construct a railroad in the streets of New York.

3. The Appellants argue at *pp. 82 et seq.* of their brief that the Appellees cannot avail themselves of the failure of the Appellants which the bill itself alleges to begin the construction of any railroad; and the brief refers (p. 28) to the allegation of the bill that the defendants had by their acts prevented the complainants from constructing their road. But upon examination of the bill, as has already been pointed out, no acts of the defendants or any of them are referred to except those under the municipal rapid transit act of 1894. That was eleven years and more after the incorporation of the Central Company. Nor did the bill allege any specific act of the defendants, other than the conduct of the necessary legal proceedings to complete the municipal franchise, until the making of the contract in 1900, almost nineteen years after the incorporation of the Central Company.

4. In order to bring their case within the provision of the New York statute (chap. 433 of the laws of 1893) providing that, where any steam railroad corporation incorporated under the act of 1880 "has acquired the real property necessary " for its roadbed by purchase," the time for beginning its construction should be extended, the Appellants' counsel choose to say at p. 99 of the brief that

> " The complainants have acquired the real " property necessary for their roadbed *by* " *purchase through the payment of their* " *franchise taxes* to the City and State of " New York."

This assertion perhaps caps the climax of the complainants' claim. The suggestion that the payment of the taxes for the mere privilege to be a corporation is equivalent to a conveyance of real estate to the company paying them, was hardly fit, it seems to us, for submission to this Court.

5. The Appellants argue (their brief, p. 107) that the relief they seek will not delay the construction or operation of the rapid transit railroad. They refer to the offer made in their behalf to repay to the City the amount which it has advanced,—the total cost of the construction being, as stated in the bill, $36,500,000. The Appellants say that the Appellees are estopped by their demurrer from disputing their ability to make this enormous payment. Perhaps they are so estopped. They suggest to the Court that, upon the security of their franchise, "the money necessary for this purpose " could be borrowed in Wall Street within half an " hour." If the Appellants' franchise be so valuable, it is somewhat amazing that during the twenty-two years since the incorporation of the Central Company nothing except the conduct of paper proceedings has been done to build a railroad under it or under any right asserted by the complainants.

6. The constitutionality of the rapid transit act needs no consideration unless this Court shall return the cause to the court below as within its jurisdiction. It is proper to point out that the

Court of Appeals of the State affirmed its constitutionality after elaborate argument.

Sun Printing Co. v. *New York*,
52 N. Y., 257.

VIII.

The first question certified requires no answer.

It is submitted that this question was not authorized. Sect. 5 of the Evarts act provides that, upon an appeal from an existing Circuit Court direct to this court, where "the jurisdiction of the "court is in issue * * * the question of juris- "diction alone shall be certified to the Supreme "Court for decision." It is submitted that the sole question here referred to is whether the court below could originally take cognizance of the suit; and not another and later question of jurisdiction, which might or might not arise after the primary question of jurisdiction should be decided. If the court below had held that there was jurisdiction, and had then decided the federal question adversely to the complainants, and had then dismissed the bill for want of jurisdiction, refusing to consider the other matters presented by the complainants, then the question first certified might arise. But that is not the present case. And there is a further consideration.

If the second question,—Whether the Circuit Court below had jurisdiction of the bill,—be an-

swered in the negative, very certainly that court should not have proceeded further, nor should this Court proceed further except to affirm the dismissal of the bill.

If, on the other hand, it should be held that the Court below had jurisdiction, the cause will, no doubt, be returned to that court that it may exercise that jurisdiction to investigate the right alleged to belong to the complainants and to arise under the constitution of the United States. When that right appears, and not until then, will any question arise whether or not,—that right being adjudged adversely to the complainants,—the court below has jurisdiction to deal with questions, not federal, which are presented by the complainants' bill.

We venture, besides, to point out to the Court that the first question certified is not distinctly phrased. It asks whether, if the complainant to a bill of equity, claiming a federal right, and the parties all being citizens of the same State, "shows " no right arising under the constitution of the " United States, ought the Circuit Court to decide" other matters of equitable cognizance pleaded in such bill "which are not Federal." The words "shows no right" are ambiguous. If they refer to the face of the bill, then very certainly the court had no jurisdiction when it appeared on the face of the bill that no federal right is involved. If, on the other hand, the implied assumption is that the Circuit Court by sufficient allegations in the bill has originally acquired jurisdiction, but upon the taking of testimony the complainant's assertion of a Federal right is disproved, and if the question then

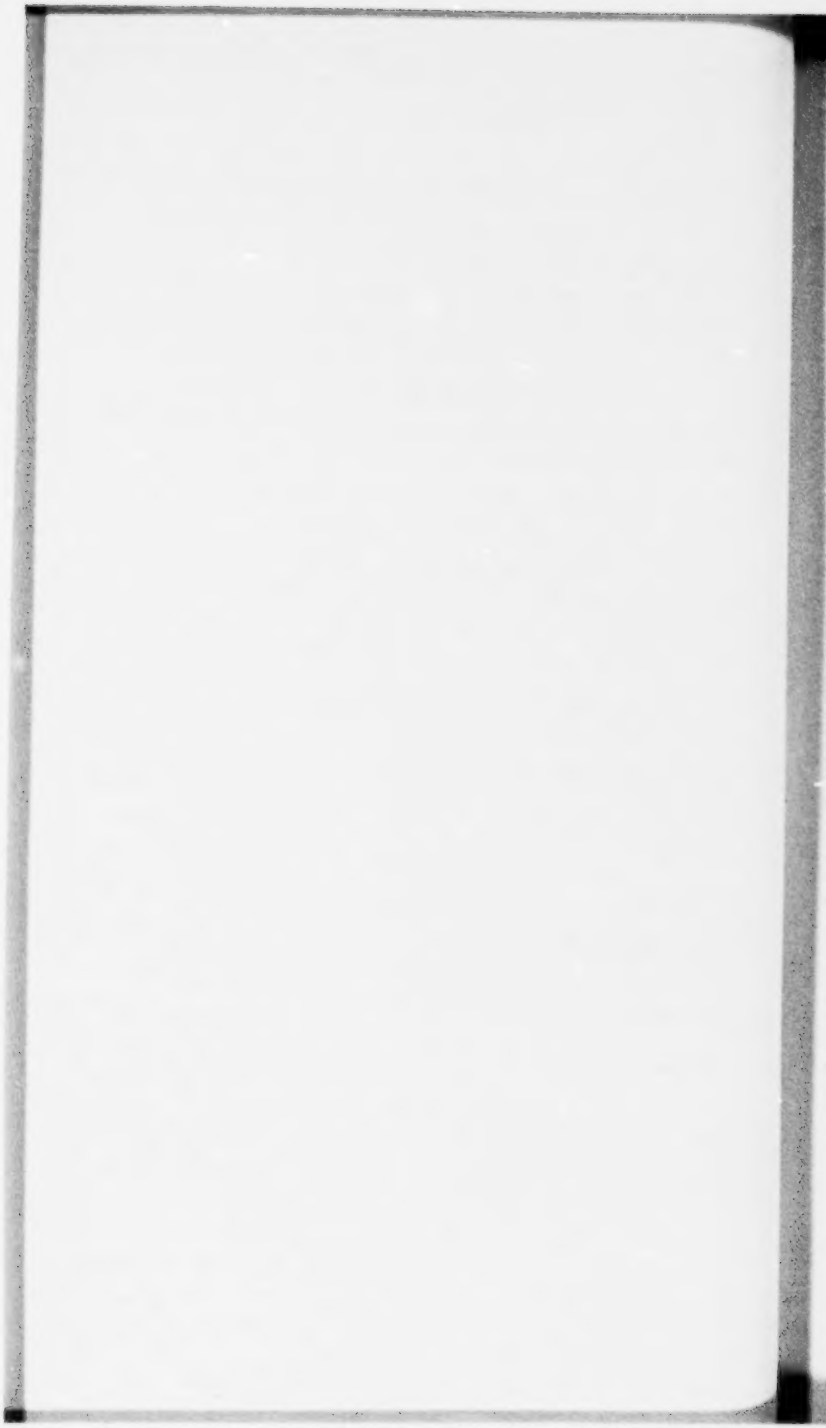
is, *Whether jurisdiction having originally attached upon a genuine federal question, and, upon that question, the complainants having failed on the merits, the Court shall proceed to deal with the other questions,*—we have only to say that no such assumption is justified, in any view of the present record. The only question here is, Whether, upon the face of the bill, there were Federal jurisdiction.

FINALLY.

The decree of dismissal for want of jurisdiction should be affirmed.

New York, January 12th, 1904.

EDWARD M. SHEPARD,
GEO. W. WICKERSHAM,
DE LANCEY NICOLL,
of Counsel for the Appellees.



Supreme Court of the United States.

No. 150.—October Term, 1903.

The Underground Railroad of the City of New York and the Rapid Transit Underground Railroad Company, Appellants, *vs.* The City of New York, Robert A. Van Wyck, Individually and as Mayor of the City of New York; Bird S. Coler, et al.

Appeal from the Circuit Court of the United States for the Southern District of New York.

[March 21, 1904.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This was a bill filed on behalf of the Underground Railroad of the City of New York and the Rapid Transit Underground Railroad Company, corporations organized under the laws of New York, against the City of New York, the Mayor, the Comptroller, and the Rapid Transit Commissioners of New York, and contractors engaged in the construction of an underground railway and subway in that city, all of the State of New York, to enjoin payment for work done and further construction. The bill was demurred to for the reason, among others, that the Circuit Court was without jurisdiction in that the averments of the bill did not present a case arising under the Constitution or laws of the United States, which was the sole ground on which jurisdiction was invoked. The demurrer was sustained and the bill dismissed for want of jurisdiction, 116 Fed. Rep. 952, and, the question of jurisdiction being certified, the case was brought directly to this court.

If, on the face of complainants' statement of their own case, it does not appear that the suit really and substantially involved a dispute or controversy as to the effect or construction of the Constitution, on the determination of which the result depended, the Circuit Court was right and its decree must be affirmed. *Defiance Water Company* v. *Defiance*, 191 U. S. 184, and cases cited.

The bill refers to the rapid transit acts of 1891, (Laws 1891, c. 4,) 1894, (Laws 1894, c. 752,) and 1895, (Laws 1895, c. 529,) and sets forth their provisions for a rapid transit board empowered to construct an underground railroad in the city of New York; for the submission to the electors of the city of the question whether there should be municipal construction of railroads; for the power of the board, in case a majority

vote favored municipal construction, to grant the right to maintain and operate the municipal railroad for not less than thirty-five years nor more than fifty years; for the advance by the city of the funds to construct the railroad; for the borrowing of money and the issuing of bonds therefor; for the laying out of the routes and the adoption of the plan of construction by the board; for the requisite consent of the local authorities, consisting of the mayor and common council, and of a majority in value of the abutting owners, or, in lieu thereof, of the Supreme Court of the State; for the various steps of procedure after the popular vote in favor of municipal construction; and for details of the contract for the construction and operation of the municipal road.

The bill further alleges that the Rapid Transit Board had determined on the construction of an underground railroad; that the local authorities have duly given their consent and that the Appellate Division of the Supreme Court has, on application of the board, appointed three commissioners to determine whether the railroad ought to be constructed and operated; that said commissioners have duly determined that it ought to be; that their determination has been duly approved by the court, and has been taken in lieu of the consent of the property owners; that the city of New York, the municipal authorities and board have entered into a contract, February, 1900, with defendant contractors, to construct the road over the routes determined on, and that the railroad is now in process of construction, and large sums of money have been paid out by the city therefor.

But it is asserted that the complainants had a prior exclusive right under contract with the State to the use for underground railroad purposes of the streets now sought to be used for the municipal rapid transit road, and that the legislation is in conflict with the Fourteenth Amendment, and section 10 of Article II of the Constitution.

No rights created by the Constitution are asserted, and if the facts set up by complainants are, as matter of law, wholly inadequate to show possession of contract rights as between them, or either of them, and the State, then no dispute or controversy arises in respect of an unconstitutional invasion of such rights.

The bill avers that the Underground Railroad of the city of New York, one of the complainants, was formed August 21, 1896, by the consolidation of the Central Tunnel Railway Company, the New York and New Jersey Tunnel Railway Company and the Terminal Underground Railway Company, as to the two latter of which no claim is made and no question arises.

And it alleges that the Central Tunnel Company was organized March 26, 1881, "under the so-called General Railroad and Tunnel Law of the State of New York, namely, chapter one hundred and forty of the Laws

of 1850, and of the various acts amendatory of and supplemental to the same, and chapter five hundred and eighty-two of the Laws of 1880."

That company's articles of association declared its purpose to be "constructing and maintaining and operating a railroad for public use in the conveyance of persons and property."

Chapter 140 of the Laws of New York of 1850, as amended by chapter 133 of the Laws of 1880, provided that railroad corporations formed under it should possess in addition to "the powers conferred on corporations in the third title of the eighteenth chapter of the first part of the Revised Statutes," (which did not include power to construct railroads or to use the streets of a city,) the power "to construct their road across, along, or upon any . . . street, highway, . . . which the route of its road shall intersect or touch. . . . Nothing in this act contained shall be construed . . . to authorize the construction of any railroad not already located in, upon or across any streets in any city, without the assent of the corporation of such city." Laws 1850, p. 211; Laws 1880, p. 242.

By chapter 10 of the Laws of 1860 it was provided: "It shall not be lawful hereafter to lay, construct or operate any railroad in, upon or along any or either of the streets or avenues of the city of New York, wherever such railroad may commence or end, except under the authority and subject to the regulations and restrictions which the legislature may hereafter grant and provide," (Laws 1860, p. 16,) which was carried forward into the charter of the city of New York of 1882. Laws 1882, c. 400, § 1943. This was held by the Court of Appeals to render the general railroad act inapplicable to the city of New York. *Matter of Washington &c. Railroad Company*, 115 N. Y. 442.

The constitution of the State contained, by amendment adopted in 1874, the following provision:

"But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of the street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the general term of the Supreme Court, in the district in which it is proposed to be constructed, may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

This was continued by the constitution of 1894, which changed the words "General Term" to "Appellate Division," and the word "district" to "department."

The Court of Appeals ruled in *People* v. *O'Brien*, 111 N. Y. 1, that in order for a railroad corporation to acquire authority to construct or operate

a railroad upon the streets of any municipality, not only the consent of the municipal authorities was indispensable, but that they were empowered to grant such consent on such terms and conditions as they chose to impose.

The first section of chapter 582 of the Laws of 1880 provided:

"Whenever such road, or any part of the same, is intended to be built within the limits of any city or incorporated village of this State and to run by means of a tunnel underneath any of the streets, roads or public places thereof, the said company, before building the same underneath any of said streets, roads or public places, shall obtain the consent of the owners of one-half in value of the property bounded on the line, and the consent of the board of trustees of the village by resolution adopted at a regular meeting and entered on the records of said board, and of the proper authorities having control of said streets, roads or public places; or in case such consent of the owners of property bounded on the line cannot be obtained, the general term of the Supreme Court in the district in which such city or village is situated may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be allowed to be built underneath said street, roads and public places, or any of them, . . . and the determination by said commissioners, confirmed by the court, may be taken in lieu of the consent of said authorities and property owners." Laws 1880, p. 872.

In *Matter of New York District Railway Company*, 107 N. Y. 42, decided in 1887, the Court of Appeals held that street underground roads were street railways and that the constitutional provision applied to them; that the act of 1850 had no application to street railroads, and, if it had, the authority to construct had been taken away by the act of 1860; and that the provision of the act of 1880, allowing the action of the Supreme Court commissioners to stand in the place of the consent of the municipal authorities was unconstitutional, and also as to the consent of the abutting owners, because indivisible; but that perhaps the act might stand as authority for the construction of an underground street railway on condition of the assent of the city authorities and the half of abutting values, rejecting all the provisions for the appointment of commissioners.

It follows that the Central Terminal Company could have acquired no right to build the proposed railroad without the consent of the municipal authorities and the consent of the abutting property owners, yet no such consents are asserted to have been given it, and the contrary appears on the face of the bill. But after setting forth the provisions for a rapid transit board by the Rapid Transit Act of 1891, as amended, especially in 1894, and the proceedings thereunder, which showed that the consent of the municipal authorities and of the Supreme Court in lieu of the property owners had been given to the municipal construction sought to be enjoined, the bill argues that the determination and consents in favor of such municipal construction amounted to authority to construct the railroad of the Central Tunnel Company because it was an underground railroad, which

it had been proposed should occupy the same route or part of it, notwithstanding the railroad of that company had not been consented to by either the local authorities or the abutting property owners or the Supreme Court acting for them.

We quite agree with the Circuit Court that this contention is wholly inadmissible. The determination of the Rapid Transit Board and the consents of the municipal authorities and the abutting owners to municipal construction could not be regarded as enuring to the benefit of private parties who had endeavored to acquire the franchise twenty years before and had failed to perform the conditions essential to the right to construct such a road.

The bill also avers that the consent of the abutting property owners could not be obtained by the Central Tunnel Company, and that the company applied to the General Term of the Supreme Court for the appointment of three commissioners, and that on February 2, 1883, commissioners were appointed, one of whom declined to serve, whereupon the court appointed another commissioner, who also declined to serve; that the company thereupon applied for another appointment, and "said application was duly granted by said court;" but that the said General Term and its successor, the Appellate Division, had not yet entered said order, and that, by reason of the inaction of the Supreme Court, the Central Tunnel Company and its successor, the Underground Railroad Company, had not been able to continue the proceedings before commissioners, and neither of said corporations had been able to commence the construction of its line of railroad. If this imputation of laches could in any view be entertained it is enough to say that the General Term in 1886 adjudged the act of 1880, under which the application was made, to be unconstitutional in respect of obtaining consents, *Matter of New York District Railroad Company*, 42 Hun, 621, and, as already mentioned, this decision was affirmed by the Court of Appeals. 107 N. Y. 42.

The general railroad law of 1850 provided for the filing of a map and profile of the proposed route, and this was done by the Central Tunnel Company, March 28, 1882, and the bill claims that thereby the company obtained a contract right. But the mere filing of a map and profile by a company incorporated under that law could not give an exclusive right to the occupancy of the space included in such map and profile as against the State. In some instances it might give priority as between railroad corporations, whose corporate existence had not lapsed for non-construction, but only until the legislature otherwise provided. And so it was held in *People* v. *Adirondack Railway Company*, 160 N. Y. 225, where, among other things, it was observed: "There is no property in a naked railroad route, existing on paper only, that the State is obliged to pay for when it needs the land covered by that route for a great public use, and

its officers are authorized to act by appropriate legislation." The judgment was affirmed by this court in *Adirondack Railway Company* v. *New York State*, 176 U. S. 335, and we said:

"But the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and when unexecuted cannot be held to be in itself a vested right surviving the existence of the franchise or an authorized circumscription of its scope." . . .

"We agree with the Court of Appeals, as has already been indicated, that the railroad company occupies no position entitling it to raise the question. The steps it had taken had not culminated in the acquisition of any property or vested right."

Where certain routes have been determined according to law, and the necessary consents have been obtained, and real estate has been acquired by condemnation, the situation would be entirely different. *Suburban Rapid Transit Company* v. *Mayor*, 128 N. Y. 510. But without the consents the right to construct and operate could not become vested. *In matter of application of the Rochester Electric Railway Company*, 123 N. Y. 351.

The Underground Railroad, one of the complainants, was, as before stated, formed by the consolidation of the Central Tunnel Company with two other companies under chapter 676 of the Laws of 1892, which provided for the consent of the proper city authorities and of the owners of one-half in value of the abutting property, or, as to the latter, the determination of commissioners affirmed by the Supreme Court. Neither of these consents is alleged to have been obtained.

It is averred, however, that the company paid, when its articles of consolidation and incorporation were filed in August, 1896, the incorporation tax of one-eighth of one per cent on its capital stock, required to be paid by chapter 908 of the Laws of 1896; but the payment of a tax for the privilege of being a corporation did not carry with it the right to occupy any street of New York with its proposed railroad.

And the fact, also asserted, that this company filed a map or profile did not, as we have seen, in itself create a contract right.

The company is alleged to have leased its road to the Rapid Transit Underground Railroad Company, the other complainant, which was incorporated in 1897, subject to the rapid transit law of the State and the railroad law under which it was incorporated. The consent of the municipal authorities and the consent of the abutting property owners, or the substituted consent of the Supreme Court, were essential to the right to construct a railroad, and these it never obtained. It paid the incorporation tax under the tax law of 1896, but that gave no right of construction, nor did its filing of a map or profile. There is also an averment that this company "paid taxes duly assessed against it by the city, county and State of New York," but none that any tax was paid on the right to construct a railroad in the streets of New York.

The result is that it appeared on the record that complainants possessed no contract rights, which were impaired, or of which they were deprived, and that the suit did not really and substantially involve a dispute or controversy as to the application or construction of the Constitution.

We, therefore, do not deem it necessary to further unfold the convolutions of this lengthy bill. Many matters attacking the validity of the Rapid Transit acts, and the proceedings in municipal construction thereunder, were put forward, but we are not called on to consider them in view of the conclusion that the Circuit Court did not acquire jurisdiction.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.